MODEL CRIMINAL CODE

CHAPTER 3

THEFT, FRAUD, BRIBERY AND RELATED OFFENCES

Report

MODEL CRIMINAL CODE OFFICERS COMMITTEE OF THE STANDING COMMITTEE OF ATTORNEYS-GENERAL

December 1995

These are the final views of the Model Criminal Code Officers Committee. They do not represent the views of the Standing Committee of Attorneys-General

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PREFACE

Background

On 28 June 1990, the Standing Committee of Attorneys-General (SCAG) placed the question of the development of uniform criminal codes for Australian jurisdictions on its agenda. That decision flowed from a request of the Northern Territory Attorney-General and took into account that most jurisdictions were either undertaking, or about to undertake, major reviews of their respective criminal laws.

In order to advance the concept, SCAG established a Committee - originally known as the Criminal Law Officers Committee (CLOC) - which consisted of one or more officers from each jurisdiction who had special responsibility for advising his or her Attorney-General on criminal law issues. In November 1993, SCAG changed the name of the Committee to the Model Criminal Code Officers Committee (MCCOC) in order to communicate the Committee's primary role more clearly.

The first formal meeting of the Committee took place in May 1991, when it was decided that priority should be given to principles of criminal responsibility which were seen as the very foundations of any system of criminal justice. The Committee delivered a Discussion Draft of a proposed Chapter of a Model Criminal Code dealing with General Principles of Criminal Responsibility to SCAG in July 1992 and it was circulated for comment.

Fifty-two written submissions were received in response to that Discussion Draft. In addition to these submissions, the Final Report reflects the substance of many meetings with criminal law experts and detailed comments from delegates to the Fourth International Criminal Law Congress held in Auckland in September 1992. SCAG approved the release of the Report on General Principles of Criminal Responsibility and the accompanying Draft Bill for public comment at its February 1993 meeting.

The following jurisdictions have endorsed the Report on General Principles of Criminal Responsibility, except for the intoxication rule: ACT, Commonwealth, New South Wales, Queensland, Tasmania, Western Australia (WA have reserved on some issues) and the Northern Territory. SCAG has decided that the case *DPP v Majewski* [1977] AC 480 provides a better basis for the Model Criminal Code than *O'Connor's* case (1980) 146 CLR 64. SCAG has requested preparation of a provision to give effect to this decision. This has been done. The Commonwealth has enacted the Chapter in the *Criminal Code Act 1995*.

Theft, fraud, bribery and related offences

The excesses of the 1980s have focussed a great deal of attention on the prosecution of fraud offences in Australia. Corruption in the public sector has also found focus in the FitzGerald Report in Queensland and WA Inc in Western Australia.

That focus finds the substantive law in areas such as theft, fraud, secret commissions and bribery fragmented and complex. The nine jurisdictions operate under nine sets of laws which adopt fundamentally different criteria. Despite the fact that large fraud cases or sophisticated rings trafficking in stolen car parts operate across the country, police interviewing suspects in Brisbane will have to consider a different range of offences and definitions from their counterparts in New South Wales and Victoria. Even the definitions of the basic theft offence are each fundamentally different from one another. Those differences necessitate different questions to establish liability. Where prosecutions are to ensue in those other jurisdictions, detectives from Melbourne, for example, will have to fly to Brisbane and do an entirely different interview based on the elements of the Victorian offences. For some of the offences, even the basic rules about criminal responsibility will be different in Victoria from those which will apply when the case comes to trial in Queensland. Each state will require different sets of prosecution and defence lawyers in each jurisdiction, thus adding to expense and working against moves to facilitate national legal practices and uniform evidence laws.

The technical and complex nature of theft and fraud law compounds these problems, especially in the six jurisdictions which retain the common law or the *Griffiths Code* variations on the common law. Inexperienced police officers can be confronted with a choice between a myriad of specific theft or fraud type offences cobbled together over the years to plug gaps in the pre-existing law. For example, the New South Wales *Crimes Act* contains a multitude of offences relating to fraud and theft. Often the choices involve excessively technical distinctions about which offence is the correct one to choose. These choices can dog the case from the charge decision, to committal, to drawing the indictment, to the judge's charge to the jury, to the jury's decision over which charge, if any, to convict on.

This complexity adds a layer of difficulty to cases - particularly fraud and forgery cases - which are already complicated by technical evidence, large quantities of documentary evidence, and outmoded rules of evidence and procedure. The Standing Committee of Attorneys-General has separate projects running on uniform evidence law (now passed in the Commonwealth and New South Wales) and the simplification of evidence and procedure in complex fraud cases. The current fragmentation and complexity of the substantive law threatens the success of these initiatives. But the case for consistency does not rest solely on grounds of efficiency. Whether a person gets convicted of theft, forgery or bribery or a related offence should not depend on those offences having different elements on one side of the River Tweed from the other. Justice and efficiency demand consistent if not uniform offence provisions.

In September 1992, a special SCAG meeting on complex fraud cases requested MCCOC to give priority to fraud as the first substantive offence chapter of the Model Criminal Code. This request was based in part on recommendation 8

of the National Crime Authority's Conference on White Collar Crime held in Melbourne in June 1992:

> That the various State laws and codes be revised so as to provide uniform fraud legislation as a mechanism for consistency for investigation and presentation of evidence in all Australian jurisdictions.

The Standing Committee had in mind the revision of the various substantive fraud offences into a uniform fraud code as part of its reform agenda on the related issues of criminal procedure and laws of evidence applicable to serious and complex fraud. These evidentiary and procedural reforms are being addressed by the various jurisdictions.

At an early stage of its deliberations on this topic, MCCOC decided that it would be impossible to deal with fraud in isolation from theft and related offences such as blackmail, forgery, bribery and secret commissions. All these offences involve dishonest acquisition of money or property and may generally be termed property offences. Modern codification projects in this area of the law - notably the *Theft Act 1968* (UK), and the theft laws of Victoria and the Australian Capital Territory, which were based on the *Theft Act* - deal with most of these offences as a package. MCCOC has extended the *Theft Act* model to include the offences of forgery, bribery and secret commissions in that package. The relationship between the various offences is such that they cannot sensibly be dealt with in isolation from one another. The *Theft Act* model enables the application of similar concepts across the various offences to produce a logically consistent Code.

MCCOC divided the offences into two groups to facilitate the consultation process. The first Discussion Paper (issued in December 1993) dealt with theft, fraud and aggravated forms of theft (robbery and burglary). The Committee argued that the first Discussion Paper provided the basis for reaching a national agreement on a very complex area of the law. More than most offences, fraud knows no jurisdictional boundaries and, in view of what has come to be termed "the excesses of the 80s", the need for a uniform and principled approach to the problems of fraud and these related offences has never been greater. The vast majority of the submissions endorsed the adoption of the *Theft Act* model and the goal of uniformity in this area of the law.

The second Discussion Paper (issued in July 1994) dealt with the related offences of blackmail, forgery, bribery and secret commissions. The *Theft Act* model included blackmail but the other offences are very much in need of modernisation. They also vary considerably between the jurisdictions. All of the offences have been codified employing concepts from the *Theft Act* model but with little alteration to their substance. The major exception in relation to the substance of the offences is the extension of bribery to include bribes offered in the private sector, a reflection of the increasingly blurred and artificial nature of the public/private distinction as a result of privatisation of government

functions. More modestly, the forgery offences have been updated to reflect modern technology - innovations such as the computer and high quality photocopiers.

In drafting the criminal responsibility chapter of the Model Code, MCCOC attempted to make the document comprehensive and yet concise and capable of being understood not only by legal practitioners but also by the general public. MCCOC felt that a Code which could only be interpreted by lawyers would fail a basic test of acceptability. The content of such a fundamental area as the criminal law should be accessible to all citizens. To that end, MCCOC requested Parliamentary Counsel to adopt a plain English drafting style. The Committee expresses its gratitude to Mr Don Colagiuri, Deputy Parliamentary Counsel in New South Wales, who has admirably carried on the work of Mr Eamonn Moran, Deputy Chief Parliamentary Counsel of Victoria, who drafted the Bill for chapter 2. However, Mr Colagiuri worked under the constraint that as far as possible he was to follow the *Theft Act* which has been the subject of detailed interpretation by the courts. MCCOC decided to avoid unnecessary litigation of new terminology (which in itself can add to the cost of justice) and in places this has come at the cost of a plainer style of drafting.

The design of this document — with Code provisions on one page and commentary on the facing page — was also done with a view to making the proposals as clear as possible.

The Committee wishes to thank Dr David Neal who wrote the commentary and drafted the Code provisions for the Discussion Papers and wrote the commentary for the final report on behalf of the Committee. The Committee also thanks Mr Andrew Menzies, AM, OBE who researched and wrote Working Papers for the Committee in the areas of forgery, bribery and secret commissions and Mr Ian Leader-Elliott who made detailed written submissions and on numerous occasions has acted as a generous sounding board for proposed solutions to the problems raised in the consultation process.

In general, the Final Report puts its recommendations in the form of draft legislation accompanying the commentary. However, where the recommendation is to abolish or not include a provision in the *Model Criminal Code*, that is presented in the commentary as a separate recommendation.

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ABBREVIATIONS

Chapter 2	*General Principles of Criminal Responsibility* Final Report of the Model Criminal Code Officers Committee. December 1992
MCC	*Model Criminal Code*. The *MCC* currently consists of this chapter and the Bill attached to the Report on chapter 2, the *General Principles of Criminal Responsibility*. The *Criminal Code Act 1995 (Cth)* enacts the *Draft Bill* attached to the Chapter 2 Report with the exception of the provisions relating to the *O'Connor* defence. The drafting of the Commonwealth Act differs slightly from that of the *Draft Bill*. These changes have been approved by the Standing Committee of Attorneys-General. Chapter 2 of the *MCC*, including these changes, is appended to this Report.
CLRC (Theft)	*Theft and Related Offences* Eighth Report of the Criminal Law Revision Committee (UK). May 1966
DP1	*Theft, Fraud and Related Offences* Discussion Paper - Part One. Model Criminal Code Officers Committee, December 1993
DP2	*Blackmail, Forgery, Bribery and Secret Commissions* Discussion Paper - Part Two. Model Criminal Code Officers Committee, July 1994.
Fisse	Fisse, *Howard's Criminal Law* (5th ed, 1990.)
Gibbs	*Review of Commonwealth Criminal Law*, 4th Interim Report, 1990.
Lanham et al	Lanham, Weinberg, Brown and Ryan, *Criminal Fraud* (1987)
Law Com 55	The UK Law Commission, *Criminal Law: Report on Forgery and Counterfeit Currency* (1973)

Law Com 228	The UK Law Commission, *Criminal Law: Conspiracy to Defraud* (1994)
Murray	M. Murray QC, *The Criminal Code: A General Review*, WA, 1983.
O'Regan	R O'Regan QC, J Herlihy and M Quinn, *Final Report of the Criminal Code Review Committee to the Attorney-General*. Queensland Criminal Code Review Committee, June 1992.
Smith	Smith, *The Law of Theft* (7th ed, 1993).
Williams and Weinberg	Williams and Weinberg, *Property Offences* (2nd ed, 1986).

Legislation

ACT	*Crimes Act 1900 (ACT)*
Cth	*Crimes Act 1914*
NSW	*Crimes Act 1900 (NSW)*
NT	*Criminal Code Act (NT)*
Qld	*Criminal Code 1899 (Qld)*
Qld (New)	*Criminal Code 1995 (Qld)* (Due to be proclaimed on 17 June 1996)
SA	*Criminal Law Consolidation Act 1935 (SA)*
Tas	*Criminal Code 1924 (Tas)*
Vic	*Crimes Act 1958 (Vic)*
WA	*Criminal Code 1913*

CONTENTS

GENERAL INTRODUCTION

Clearly the choice for model theft and fraud provisions must be one which reduces the complexity of the common law and its *Griffiths Code* variants.

The common law approach is now followed in only two Australian States, namely, New South Wales and South Australia. This approach relies upon the basic offence of larceny, modified and supplemented by a large number of statutory offences. For example, the New South Wales *Crimes Act* contains over 150 offences dealing with various theft, fraud and related offences. Often these offences have nothing to do with the essential nature of the conduct but depend on the nature of the object taken.

When the law of larceny took shape some six centuries ago, notions of ownership and intangible rights, the foundation of the modern commercial community, were far less important. At a time where people's economic relations were relatively simple, the law of larceny focused on protecting *possession* of physical objects. Larceny was to fraudulently take and carry away some physical object from a person without that person's consent and with the intention of permanently depriving the person of the object. This meant that larceny was not applicable to a person who appropriated another person's goods if those goods were already in the possession of the "thief". For example, a carrier did not commit theft if he or she made off with the goods being carried. The common law had to invent the notion of breaking bulk - the carrier committed theft when the package was broken open - to deal with this situation. Similarly, a person could not be convicted of theft of electricity or land because they were things which could not be taken up and carried away.

Since the early part of the industrial revolution in the eighteenth century, judges and legislatures have been struggling to adapt the law of larceny to the needs of societies with more and more complex and abstract notions of property rights: the idea that there can be a division of interests - ownership, possession, control - of the same object; the creation of abstract rights by special documents like cheques and credit cards.[1] These adaptations have produced a patchwork of judicial decisions and statutory provisions. Notoriously, the common law had difficulty dealing with intangible property (eg electricity), a fatal flaw in the computer age. Special provisions have been enacted for the theft of things like electricity and altering data on computers to perpetrate frauds. But even more prosaic objects - cattle, dogs, documents, objects attached to land or buildings, aircraft, etc - have required special provisions. Other offences depend on the status of the person from whom the property was taken (an employer, a landlord); still others depend on the status of the person who takes the property (a servant, a public servant); others again depend on the location of the property (a ship, a wharf, a mine, etc).

1 See Fletcher, "The Metamorphosis of Larceny" (1976) 89 *Harv LR* 469; J Hall, *Theft, Law and Society (1935).*

But the common law also has very complex conceptual distinctions. The common law of larceny requires the taking to occur without the owner's consent but then relies on special provisions to deal with situations where the defendant already has possession of the goods with the owner's consent which he or she then "converts" to his or her own use (eg larceny by a servant or by a bailee), or the defendant intercepts property intended for the employer before it comes into the employer's possession (embezzlement). Where the defendant deceives the victim, the correct offence to charge depends on whether the defendant's deception caused the victim to mean to transfer ownership or merely possession of the goods. It will be larceny by a trick if defendant's deception leads the victim to intend to transfer *possession* of the goods; if the victim intends to transfer *ownership* the offence is obtaining by false pretences. Still other problems arise if the defendant comes to possess the goods innocently (eg because of a mistake) which the defendant did not induce or know of at the time the goods were handed over. For example, the defendant's salary envelope contains an overpayment and when the defendant opens the envelope at home, he or she discovers the overpayment and decides to keep it.

The *Griffiths Code* improved this situation somewhat by combining various forms of common law larceny into one offence of stealing. Stealing is defined to include fraudulent taking and fraudulent conversion. Although this approach reduces the number of stealing offences, it does little to simplify the complexity of the law of theft. Moreover, the *Griffiths Code* drew a distinction between stealing and other forms of fraud, in particular, false pretences. And like the common law, there is a myriad of offences supplementing the basic offences.

Nearly twenty-five years ago, England abolished the common law of theft and fraud and replaced it with a relatively short statute based on three key offences: theft, obtaining property by deception and obtaining a financial advantage by a deception. Today, in Australia, we have six jurisdictions which still have the common law or a *Griffith Code* variant. The other three have adopted the English *Theft Act* approach. Thus the nine jurisdictions operate under three basically different systems. Even in Victoria which adopted the *Theft Act* in 1973, substantial issues which have arisen in the case law require significant changes. The leading Australian text on the law of theft summarises the position for reform forcefully:

> In the six Australian states and two Territories there are to be found three quite different sets of legal rules governing offences against property. Two States, New South Wales and South Australia, retain the common law. Three states, Queensland, Western Australia and Tasmania, have Codes which were enacted in the period from 1899 to 1924. The remaining state, Victoria, has a modern *Theft Act* based upon the English *Theft Act* 1968. The *Criminal Code* of the Northern Territory, which came into force on 1 January 1984, adopts with a number of amendments,

> the Victorian *Theft Act*. The *Crimes (Amendment) Ordinance* (No 4) 1985 (ACT), which came into force on 1 January 1986, also adopts, with amendments, the Victorian *Theft Act*.
>
> . . . There is no reason why conduct which is criminally dishonest should not be conceived and defined uniformly throughout Australia. Certainly there is no justification for continued toleration of the complexity and extreme technicality of the common law in this area. The Tasmanian *Code* is essentially simply a codification of the common law. The Queensland and Western Australian *Codes* are more far reaching, but succeed in escaping from the complexity and technicality of the common law only to a limited extent. The *Theft Act* was designed as a Code relating to property offences and was intended to meet the needs of a modern commercial society. The Act has, however, now been the subject of a great amount of case law and academic scrutiny in both England and Victoria and a number of fundamental difficulties have been revealed.
>
> In spite of these difficulties it is the view of the writers that the *Theft Act* could, with suitable amendments, serve as a model for adoption in each of the Australian jurisdictions.[2]

The Commonwealth should be added to this list. The Commonwealth *Crimes Act* has a series of theft and fraud offences dealing with property of the Commonwealth. Like the Western Australian and Queensland *Codes*, these offences avoid some of the difficulties of the common law, but are still largely based on the common law and therefore subject to the criticisms made by Williams and Weinberg. The Gibbs Committee review of the Commonwealth provisions also recommended a model based on the *Theft Act*.[3]

Several different expert bodies have made the same case for completely reconstructing the law of theft and fraud. In 1966, after a 7 year review, the English Criminal Law Review Committee recommended the abolition of the common law rules relating to theft and fraud:

> Nevertheless, we are strongly of the opinion that the time has come for a new law of theft and related offences, based on a fundamental reconsideration of the principles underlying this branch of the law and embodied in a modern statute. We have tried to expose the defects of the present law in the sections of our report relating to each of the offences and to the most important ancillary matters covered by the Bill. We have tried not to exaggerate the defects; but if it is agreed that our estimate of them

2 Williams and Weinberg, 1-2.

3 Gibbs, Part 3.

> is a fair one we do not believe that it can be seriously disputed that a new law is necessary . . . There was no disagreement as to the necessity of rewriting the greater part of the existing law or the desirability of including it in a single Act of Parliament. There have been many demands for a new law of theft and kindred offences. These have been prompted not only by theoretical objections to the anomalies and complications of the present law but also by practical experience of its inadequacy in important respects. Even the advantage of familiarity enjoyed by the present law is a short term one; and the inconvenience of having to learn and apply a new system will soon be far outweighed, we hope, by its practical advantages and greater simplicity. Moreover the argument of familiarity could hardly prevail against the greatly increased impetus given to law reform in recent years. On all grounds the case for a new law seems to us overwhelming.[4]

Nearly 30 years after the passage of the *Theft Act* 1968 in England, the English Law Commission has announced a comprehensive review of dishonesty offences including the *Theft Act* and the *Forgery and Counterfeiting Act* 1981 to simplify and modernise the law, to keep pace with technological changes, and to minimise the length and complexity of serious fraud trials.[5]

In this Report, MCCOC completes that comprehensive review process for Australia. We have recommended a number of changes to the *Theft Act* model to simplify it and to gear the law of dishonesty to the use of computers in various dishonesty offences, in particular, fraud and forgery. We have also extended the logic of the *Theft Act* to the whole range of dishonesty offences. In contrast to the common law and the Griffiths Codes, the UK *Theft Act* model consolidates the traditional law of theft, not by combining the elements of various offences into one definition, but by starting from a new concept of "dishonest appropriation" and by employing more abstract concepts which virtually do away with the necessity to have a multiplicity of offences depending on the type of object taken, the category of defendant or victim and so on. The basic offences do not cover all forms of stealing and fraud and require some supplementation. But they do achieve a massive reduction in the complexity of the common law. Unnecessary technical distinctions merely serve as barriers to conviction and the efficient administration of justice.[6]

On the other hand, in striving for simplicity, there is a risk that the ambit of criminal liability will be unduly expanded. An example of this has occurred in England where the word "appropriation" has now become so broad as to encompass almost any dealing with property and MCCOC has recommended

4 CLRC (Theft), 7.

5 Law Com 228, 7-8.

6 Gillies, *Criminal Law* (2nd ed), 416.

a modification of this concept. There is also the risk that we will raise unreal expectations about the extent of simplification that is possible in this area. While the Committee is confident that the *Theft Act* model is far simpler and more coherent than the existing Australian law of dishonesty, there is an irreducible level of complexity that comes with complex financial transactions. Apparently straightforward transactions like writing a cheque can raise complex issues of civil law, the nature of intangible property, and who owns it. As one of the leading authorities on the law of theft, Professor J C Smith has said:

> . . .the criminal law must be able to cope with dishonesty in relation to . . the multifarious advances in the use of modern technology which have taken place since the *Theft Acts* 1968 and 1978 and the *Forgery and Counterfeiting Act* were passed. These developments suggest more rather than less technicality in the criminal law. One can readily sympathise with Beldam LJ's concern about the hours of semantic argument divorced from the true merits of the case. How to avoid it is not so easy. . . . the civil law cannot properly be ignored when the criminal legislation uses civil law concepts like proprietary interest; and the criminal courts have, in the end been compelled to take cognisance of it. Ignoring it only leads to ever growing problems. . . .If the starting point for reform is that we can eliminate things in action from the criminal law, it is, with respect, a false start. . . . There is not so very much wrong with the *Theft Acts* if they are properly handled.[7]

MCCOC agrees with Professor Smith's assessment. The *Theft Act* model has been adopted, with variations, in Victoria and the Australian Capital Territory. It has also influenced the approach adopted in the Northern Territory. Applying the *Theft Act* model to the other Australian jurisdictions would have the dual advantages of simplifying the law in individual jurisdictions and achieving uniformity. Aside from its basis in principle, uniformity also has considerable practical advantages. The advantages in fraud cases stretching beyond the boundaries of one jurisdiction have already been outlined. There are also advantages in training investigators and lawyers, preparing training and reference materials, transferability of experience, development of precedent, and consistency in sentencing across jurisdictions.

For all these reasons, MCCOC believes that the *Theft Act* model should be adopted in all jurisdictions.

MCCOC has not generally made recommendations about penalty levels for offences. However, in order to establish some sort of parity between the various theft and fraud offences, it is necessary to make some in principle recommendations on sentencing levels for these offences.

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7 Smith, "Conspiracy to Defraud: Some Comments on the Law Commission's Report" [1995] *Crim LR* 209, 210-211,219.

CHAPTER 3

THEFT, FRAUD, BLACKMAIL, FORGERY, BRIBERY AND RELATED OFFENCES

PART 3.1 - PURPOSE AND DEFINITIONS

Division 14

Purpose

14.1 The purpose of this Chapter is to codify the law of theft, fraud, blackmail, forgery, bribery and related offences.

PART 3.1 - PURPOSE AND DEFINITIONS

14.1 Purpose

The purpose of this chapter is to repeal the existing law of theft, fraud and related offences and to replace it with the Code offences. The repeals will vary from jurisdiction to jurisdiction and it will be up to individual jurisdictions to carry out this task. The Code provisions will only apply to offences committed after it comes into operation. Thus, there will be a period where the old law operates in relation to offences committed before the Code provisions commenced.

The general codification provisions in relation to the Model Criminal Code will be dealt with in Chapter 1 of the Model Criminal Code. Chapter 2 contains the general principles of criminal responsibility. [8]

8 See Chapter 2 *MCC*, and the *Criminal Code Act* 1995 (Cth)

Dishonesty

14.2 (1) In this Chapter, "dishonest" means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

(2) In a prosecution for an offence, dishonesty is a matter for the trier of fact.

Note: Section 15.2 affects the meaning of dishonesty in offences related to theft and section 17.2(3) affects the meaning of dishonesty in the offences of obtaining property or a financial advantage by deception. See also section 9.5 (Claim of right).

Gain and loss

14.3 (1) In this Chapter:

"gain" or "loss" means gain or loss in money or other property, whether temporary or permanent, and:

(a) "gain" includes keeping what one has; and

(b) "loss" includes not getting what one might get.

(2) In this Chapter:

(a) "obtaining" a gain means obtaining a gain for oneself or for another; and

(b) "causing" a loss means causing a loss to another.

Property

14.4 In this Chapter:

"property" includes all real or personal property, including:

(a) money; and

(b) things in action or other intangible property; and

(c) electricity; and

(d) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of a person;

14.2 - 14.4 Definitions

The definitions contained in these sections apply throughout this Chapter.

Most of these definitions only apply to a few of the offences in this chapter. It should also be noted that in certain offences the general definition is supplemented. For example, in the offence of theft, the definition of dishonesty is supplemented by s15.2 and the definition of when property is to be regarded as belonging to another is supplemented by s15.5. However, because the concept of dishonesty is fundamental to almost all of the offences in this chapter, the commentary on that definition occurs here.

14.2 Dishonesty

The core fault element for offences in this chapter is a fundamental issue. Both Discussion Papers proposed that the concept of dishonesty - as defined in s14.2 - should replace the older common law terms "fraudulently' and "with intent to defraud" used in offences like theft, fraud, forgery and conspiracy to defraud in both common law and Code jurisdictions. The second Discussion Paper recommended that this logic also be extended to bribery and secret commissions by using dishonesty to replace the term "corruptly" - the term generally used - and rejected proposals to enact complex statutory definitions of the fault element in these offences.[9]

There has been a great deal of debate on the concept of dishonesty, mainly in relation to the offence of theft. However, the same arguments apply to its use in other offences. The following discussion of the arguments for and against the use of the fault element of dishonesty will centre on the offence of theft. Where using dishonesty in a particular offence requires additional argument - for example, bribery - that will be located with the commentary for the offence itself.

Dishonesty is a key fault element in the offence of theft. While the offence has other fault elements - for example, an intent to permanently deprive the owner of the goods - the crucial distinction between legitimate and illegitimate transactions is the dishonesty of the person who takes the goods. While intent to permanently deprive combined with lack of consent by the owner will generally be strongly indicative of dishonesty, this is not always the case: for example, where a defendant mistakenly believes that he or she has a legal entitlement (claim of right) to take the goods. Another example arises in cases involving exchangeable things (fungibles) like money (or petrol or sugar) - where a defendant intends to permanently deprive the victim of that particular money but intends to replace it with an equivalent amount. Such cases should not automatically amount to theft.

9 DP2, 53-7, 69-83.

Person to who property belongs

14.5 For the purposes of this Chapter, property belongs to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).

Drafting note: The following provision is only required in jurisdictions that have laws that prevent a husband or wife from taking proceedings against the other party to the marriage for an offence in relation to property belonging to the husband or wife if the parties were living together at the time (for example, see section 16A of the Married Persons (Property and Torts) Act 1901 (NSW).) The provision could be included in the relevant legislation.

Proceedings for offence may be taken by husband against wife and vice versa

14.6 Despite anything to the contrary in any other Act, proceedings for an offence against this Chapter relating to property belonging, or claimed to belong, to a person who was married at the time of the alleged offence may be taken by the person against the other party to the marriage, whether or not the parties were living together at the time of the alleged offence.

The need for a fault element such as dishonesty is much greater under the *Theft Act* which is far more abstract than the old law of larceny: under the *Theft Act* there is no need to prove a physical taking and carrying away of an object or the absence of the consent of the owner. Recently, in England the case of *Gomez* has attenuated the concept of appropriation to the point that almost any dealing with the goods of another satisfies the element of appropriation[10]. Picking goods up from the supermarket shelf and putting them into your basket is an appropriation element under the *Theft Act*. It does not have to be shown that this was done without the owner's consent as would have been required at common law. The effect of this is to throw more weight onto the element of dishonesty as a means of distinguishing theft from innocent takings. Some of the effect of this will be offset by the MCCOC recommendation to include lack of consent in the definition of appropriation (see s15.3(1), below). However, while this is desirable and will minimise the residual area where it will be necessary to rely on the element of dishonesty, it will not remove that need. While the element of dishonesty (or an equivalent term) assumes greater importance under the *Theft Act* definition of theft, the controversy surrounding the meaning of that term under the *Theft Act* - and under the Code and common law equivalents - is sharp and the differences between the jurisdictions on the issue are considerable.

The Queensland and Western Australian Codes use the term "fraudulently" in their definitions of theft but they define it in terms of intention to permanently deprive. Tasmania has adopted the term "dishonestly", the Northern Territory uses "unlawfully". Victoria and the ACT use "dishonestly" in their adaptations of the *Theft Act* but each has a different definition and this is different again from the definition arrived at in the English cases on dishonesty.[11]

The common law jurisdictions - New South Wales and South Australia - use "fraudulently" in its common law sense. But the common law cases on the meaning of the term fraudulently were confused. While old definitions held that takings had to be morally wrongful, and judges said that the term fraudulently had to add something to the offence of theft, some of the cases just prior to the *Theft Act* seemed to give little meaning to "fraudulently" beyond intent to permanently deprive.[12] The framers of the *Theft Act* thought that dishonesty did add a "vital element" to theft but that the term fraudulently was too technical. They substituted "dishonestly" on the basis that it "is something which laymen can easily recognise when they see it." Because of this, the *Theft Act* does not define "dishonestly", although it does specify that certain states of mind (eg where the defendant has a claim of right, believes that he or she would have the other's consent, or believes the owner cannot be found) are *not*

10 *Gomez* [1992] WLR 1067

11 See the discussion of these elements in Williams and Weinberg, ch 2.

12 See generally, Fletcher, "The Metamorphosis of Larceny" (1976) *Harv LR* 469. In particular, *Williams* [1962] Crim LR 111, *Cockburn* [1968] 1 All ER 466.

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to be regarded as dishonest. The *Model Criminal Code* follows the *Theft Act*. The claim of right defence is set out in s.9.5 of the *MCC* with the other general principles of criminal responsibility. Cases of a person finding goods and believing that the owner cannot be found by taking reasonable steps are covered in s15.2(1). The Code does not follow the *Theft Act* in specifically saying that a taking is not dishonest where the taker believes that he or she *would* have the owner's consent if he or she knew of the taking and its circumstances. A submission from Mr I Leader-Elliott suggested that the section should also cover mistaken belief that the owner *had* consented. He also pointed out that this provision may be relevant in a deception case where, for example, because of some temporary situation the defendant needs to deceive the victim but believes the victim would consent if he or she knew the true situation. This situation is not provided for in the *Theft Act*. The Committee agrees with the submission but has concluded that these situations are best be covered by the general definition of dishonesty in s14.2(1) which does not have an equivalent under the *Theft Act*. The Code follows the *Theft Act* in providing that a taking may be dishonest even though the taker intended to pay (s.15.2).[13] But beyond these situations, what *does* it mean to be dishonest?

The positive meaning of "dishonesty" has been left to the case law where the leading English authority is the Court of Appeal decision in *Feely*. In *Feely's Case*, the defendant had borrowed money fronm his employer's till, contrary to the employer's directions, but said he intended to repay the money a couple of days later. Because Feely did not intend to repay those particular notes, he had the intent to permanently deprive. The only question was whether he was dishonest. He knew the employer did not consent so the question was what further meaning dishonesty might have. The Court of Appeal ruled that dishonesty is an ordinary word in the language and that the jury, not the judge, should determine whether the defendant's appropriation was dishonest according "to the current standards of ordinary decent people". This should not be subject to judicial elaboration. The Court of Appeal in *Ghosh* modified this into a two step test:

> ...a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
>
> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.[14]

13 Vic: s73(2) & (3); ACT: s 96 (3), (4) & (5). Subsections 73(2)(a) and (b) are not expressly applied to the deception sections (ss81 and 82) of the Victorian Act. It seems to have been assumed in the *Salvo* line of cases that these subsections do apply to the deception offences.

14 *Feely* [1973] QB 530; *Ghosh* [1982] 3 WLR 110, 118-9.

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The Court of Appeal went on to explain that in most instances where the actions are obviously dishonest by ordinary standards, the jury will easily draw the inference that the defendant knew that he or she was acting dishonestly. The defendant would not escape with a "Robin Hood" defence because he or she would know the taking was dishonest by ordinary standards, even though he or she felt morally justified in doing so.

-Arguments for the Feely/Ghosh test

The *Feely/Ghosh* test has been the subject of considerable controversy. Its supporters argue that the term it replaces - fraudulently - was similarly a matter for the jury to decide. Like the concept of negligence, dishonesty has to be flexible enough to cover a myriad of situations and to reflect community standards which may vary from time to time. They say that dishonesty is a concept that all jurors employ in everyday life and that the jury is ideally placed to determine the hard cases which hover between honesty and dishonesty. Variability between similar cases is no more a concern here than it is in negligence cases, or where juries have to determine "offensiveness" in offensive behaviour, or whether menaces are "unwarranted" in blackmail, or whether a secret commission was "corruptly" received, or the meaning of the common law term "fraudulently" in larceny or conspiracy to defraud, or the standards of self-control of an "ordinary person" in the provocation defence. As McInerney J said in his dissenting judgment in the first of the 3 Victorian decisions rejecting *Feely*:

> Differences of opinion in such cases - and perhaps *R v Williams*, *R v Cockburn and R v Feely* may be taken as illustrations - should not be allowed to obscure the truth that in the overwhelming number of cases the fact-finding tribunal - be it jury, judge, magistrate or justice of the peace - will have no difficulty deciding whether the act was done honestly or dishonestly. If or in so far as this requires the fact-finding tribunal to undertake the task of ascertaining and applying the standard of honesty, accepted in the community, it is complying with the will of Parliament which has imposed on it that very task. Nor is there any great novelty judges or fact-finding tribunals assuming to act as judges of moral standards; such task is commonly committed to them by legislation, as, in my opinion, by the provisions of the *Theft Act*.[15]

Those opposed to the *Feely/Ghosh* test argue that it is uncertain and may lead to inconsistent verdicts in similar cases. While not perfect, twelve minds on the jury may be expected to fairly reflect community standards on this issue as they are in other cases (eg criminal negligence, provocation, self-defence) when called on to make evaluative assessments. It is true that single judges and magistrates

15 *Salvo* [1980] VR 401, at 408-409.

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cannot be said to be as representative as juries but their variability on this issue is unlikely to be greater than on other similarly evaluative criteria. In any event, a degree of uncertainty or variability is preferable to a very narrowly-drawn definition of dishonesty. Certainty is a dubious benefit when it means that the defendant will certainly be convicted of theft if he or she cannot make out a claim of right in a case where he would have a chance of acquittal on the *Feely/Ghosh* test. Opponents of the *Feely/Ghosh* test tend to paint it as though it casts the law forth into a sea of moral confusion and uncertainty. In fact the cases where dishonesty is a genuine issue are few. Where it does arise, the defendant is entitled to have that question determined on its merits. It is no answer to this to say that a defendant should have to rely on prosecutorial discretion or a lenient sentence. The law can fairly be criticised if it sweeps difficult moral judgments under the carpet with a definition which simply precludes consideration of the hard question - as the Victorian cases do (see below). Dishonesty raises very difficult questions in the borderline cases. The great virtue of the *Feely/Ghosh* test is that it provides a framework in which those questions can be asked and answered so that justice can be done in the individual case.

In response to the argument about the difficulty for lawyers in advising their clients (for example, business people getting legal advice - a rare enough happening in these sorts of cases, but note *Salvo*) - the answer is that if such people are sailing too close to the wind, the prudent course would be to avoid doing it. That is a better solution than rigidly confining the concept of dishonesty in an artificial way. Convicting the common or garden person who does not have access to legal advice would be too high a price to pay for certainty.

Finally, *Feely/Ghosh* gives the defendant an argument to put to the DPP as to why the prosecution in that the case should not proceed. It is not sufficient to argue that there is no need for a dishonesty requirement and that deserving cases will be weeded out of the system by the operation of prosecution discretion at large. The presence of the element of dishonesty supplies a basis for the exercise of the prosecutorial discretion.

-Arguments against the dishonesty approach and the Feely/Ghosh test

Critics of the dishonesty approach and the *Feely/Ghosh* test regard it as an abdication of legislative and judicial responsibility and a departure from the standards of precision and certainty which should characterise the criminal law. They argue that the parameters of dishonesty should be drawn more tightly to enable judges to assist juries and to avoid inconsistent application of the test. One of the strongest criticisms of the *Feely* approach was made by Fullager J in *Salvo*:

> Long ago William Blackstone cogently warned against the notion that a judge should decide each case in the way that he thinks morally right or just, without founding his decisions on known

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> legal principles: "The liberty of considering all cases in an equitable light must not be indulged too far, lest we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law without equity, though hard and disagreeable, is much more desirable for the public good than equity without law which would make every judge a legislator and introduce most infinite confusion; and there would then be almost as many different rules of action laid down in our courts as there are differences of capacity and sentiment in the human mind."[16]

Rather than attempt to tailor a provision to deal with all possible (largely hypothetical) hard cases at the expense of clarity and certainty of the law, it is preferable that such cases could be dealt with at sentence, if not earlier eliminated by prosecutorial discretion.[17]

In Victoria, the *Feely/Ghosh* test has been rejected in a series of decisions in the Court of Criminal Appeal, though not without some strong dissenting judgments. The Victorian authorities are not easily stated but the position appears to be that unless the defendant can point to a claim of right or one of the two sub-sections describing states of mind which are *not* to be regarded as dishonest (a belief that the owner would have consented, or that the owner cannot be found), he or she will be taken to be dishonest. In other words, beyond the exceptions stated in the statute, dishonesty adds nothing to the definition of theft.[18] On the existing *Theft Act*, that means that a person who did take money from the employer's till against instructions would have to be convicted of theft even if the jury was fully satisfied that he or she did intend to return it.

Another problem is that explanation of the issue of dishonesty to juries and the determination of that issue will unnecessarily occupy the time of the courts and, given the present emphasis on reducing the cost of justice, this should be avoided.

16 *Salvo* [1980] VR 401, at 429-430.

17 See Gibbs, *Fourth Report*, paras 20.25 - 20.26.

18 There are numerous academic critics of the *Feely/Ghosh test.* See for example: J C Smith, "Commentary on *R v Feely"* [1973] *Crim LR* 192; D W Elliott, *Dishonesty in Theft: A Dispensable Concept* [1982] *Crim LR* 395; Griew, "Dishonesty: The Objections to *Feely* and *Ghosh* [1985] *Crim LR* 341. See the discussion in Williams and Weinberg, 109-120. The Victorian cases, all relating to obtaining property by deception, are: *R v Salvo* [1980] VR 401 and *R v Brow* [1981] VR 783, and *R v Bonollo* [1981] VR 633. Note that Williams and Weinberg argue that there may still be room to argue that dishonesty has some residual meaning beyond the sub-sections specifying what is not dishonest, 118.

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Other proposals

Critics of the *Feely/Ghosh* test are divided about the appropriate alternative. Some favour the test stated in the Victorian decisions, namely that dishonesty should be confined to claim of right and the two statutory exceptions. The alternative canvassed by McGarvie J in *Bonollo*[19] was that the person should be regarded as dishonest by the jury if he or she were conscious that the appropriation would cause a significant practical detriment to the victim. This is not the law in Victoria but has been codified in the ACT. An appropriation will not be regarded as dishonest in the ACT if the person:

> appropriates the property in the belief that the appropriation will not thereby cause any significant practical detriment to the interests of the person to whom the property belongs in relation to that property.[20]

Those attending the ACT consultation meeting could not recall a case in which this section had been relied on and favoured the *Feely/Ghosh* test.

The Mitchell Committee in South Australia made a similar proposal:

> Our understanding of "fraudulent" in the present context is an intention to act in a manner known to be materially inconsistent with the wishes of the victim.[21]

The Gibbs Committee criticised such provisions on the basis of looseness and uncertainty. Merely to act contrary to the wishes of the owner is not a sufficient substitute for dishonesty in the context of theft and fraud. The third approach attempts to avoid these problems: the NT uses the word "unlawfully" instead of "dishonestly". This is defined as meaning "without authorisation, justification or excuse." The Gibbs Committee proposed a similar test, "without lawful justification."[22]

Conclusion

Theft does involve "moral obloquy", as the common law cases put it, and MCCOC believes that it is necessary for the offence of theft to retain a broad concept of dishonesty in order to reflect the essential character of the offences in this chapter as involving moral wrongdoing. To define anyone who cannot rely on a legal claim of right or a belief in the owner's consent as dishonest ("the narrow approach") - and hence a thief - is unduly restrictive in the offence of theft, as the facts of *Feely's* case itself show. Where - as is proposed here - dishonesty is to be used for other offences as well as theft, the narrow approach

19 *R v Bonollo* [1981] VR 633.

20 Section 96(4)(b). See too Williams and Weinberg, 112-120.

21 South Australia, Criminal Law and Penal Methods Reform Committee, *Fourth Report: The Substantive Criminal Law,* (1977) pp161-2.

22 NT: s 209(1); Gibbs, pp132-133.

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is both restrictive and irrelevant: belief in the owner's consent in a deception case will seldom be relevant. Nor will belief in the owner's consent of a claim of right (ie to a proprietary or possessory right) be relevant in deciding whether a payment to an official in order to influence his or her duty amounts to a legitimate payment or a bribe. On the other hand, general standards of honesty and integrity will be crucial in determining that question.

The alternatives to the *Feely/Ghosh* test canvassed above are not satisfactory. The ACT/Mitchell Committee approach is not only vague, as the Gibbs Committee pointed out, but it is also too limited in relying on activity adverse to the rights of the owner.

The Northern Territory/Gibbs "without lawful justification" approach is also unsatisfactory. The effect of such a definition is itself uncertain. One possibility is that it restricts the ambit of dishonesty defences to the negative definitions of dishonesty in the Act (ie claim of right, belief that the owner would consent, etc,) and any other general justifications and excuses. But, as the Court of Appeal pointed out in *Feely,* this would lead to the unjust conviction - as a thief - of a person who intended to return the money borrowed, even though the borrowing was unauthorised. This situation might be covered by dealing with the problem of fungibles (items like sugar, petrol, etc which are interchangeable) in the way suggested in DP1 (see s302.14) but submissions rejected this approach arguing that the *Feely/Ghosh* definition of dishonesty was a more comprehensive solution to the problems of dishonesty and rendered this unnecessary. If, on the other hand, "without lawful justification or excuse" extends further to allow a more general evaluation of the Defendant's state of mind, then it merely conceals the fact that it is the same sort of test as dishonesty. MCCOC believes that dishonesty is a better term for this than "without lawful justification" or "fraudulently".

Because honest and dishonest behaviour is so variable, attempts at capturing the substance of that concept in a statutory definition would be as difficult as a statutory definition of the concept of negligence. Requiring juries to determine community standards is not a novel proposition in the law generally - negligence being the most obvious example. Although, as the arguments for and against the *Feely/Ghosh* test reveal, there are strong philosophical disagreements about how far such concepts should be used in legislation and applied by courts and juries, the Committee's view is that the best that the law can do with such general concepts is to commit them to the juries or magistrates as the arbiters of community standards in such cases. As a practical matter, dishonesty will only arise as *the* issue infrequently in the very difficult cases. Where the law can provide a test which will allow the jury to make a determination of the fundamental issue, it should do so. The prediction that the *Feely/Ghosh* test will produce uncertainty and inconsistent verdicts in a large number of cases does not seem to be borne out in England or in Australia where it is already used in a number of jurisdictions for a variety of offences. Indeed, a submission

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from his Honour Judge Boyce of the Queensland District Court said that the *Feely/Ghosh* test was easy to explain to juries and worked well. The Queensland DPP also supported the *Feely/Ghosh* test.

The *Feely/Ghosh* test is the best way of dealing with an issue that has been part of the law of theft for a very long time. The *Theft Act* merely substituted the term "dishonestly" for the term "fraudulently" in the old common law definition of larceny. The argument in *Feely* and *Ghosh* only continued earlier debates about the meaning of "fraudulently". Indeed the *Feely* test has been adopted in Australia as the correct test for "fraudulently" in New South Wales and South Australia - common law jurisdictions - and for "intent to defraud" in Western Australia and "dishonesty" in Queensland - both *Griffiths Code* jurisdictions. Trial judges in Tasmania generally adopt the *Feely* approach. It is also the test in all jurisdictions for conspiracy to defraud.[23] The Queensland Code Review Committee has proposed the *Feeley/Ghosh* test. The Murray review in Western Australia has proposed the term "intent to defraud" but this appears to be little different to the common law term fraudulently which has in turn been interpreted to mean the *Feely* test.[24]

In view of the conflict in the authorities and the diversity in the various Australian jurisdictions, some common test has to be laid down in the *Model Criminal Code*. A very clear majority of submissions favoured the *Feely/Ghosh* test as proposed in DP1 (s301), although this was not without some strong contrary submissions, in particular at the Victorian consultation seminar. MCCOC concludes that not only is the *Feely/Ghosh* test the most satisfactory in principle but that it also represents the majority consensus across the jurisdictions. Because of the Victorian case law, the test ought to be codified. Section 14.2(1) does this. Section 14.2(2) makes it clear that the issue of dishonesty is a matter for the trier of fact.

23 NSW: *R v Glenister.* [1980] 2 NSWLR 597; SA: *Kastratovic (1985) 42 SASR 59*; Queensland: *Allard [1988] 2 Qd R 267, 270-1, 276*; *Sitek [1988] 2 Qd R 284;* and *Harvey* [1993] 2 Qd R 389. WA: *Cornelius and Briggs* (1988) 34 A Crim R 49; *Clark and Bodlavich* (1991) 52 A Crim R 180, at 193-4. Tas: *R v Fitzgerald* (1981) 4 A Crim R 233. Conspiracy to defraud cases employing the *Feely/Ghosh*: test of honesty as the essential component: *Walsh* [1984] VR 474, *Horsington* [1983] 2 NSWLR, *Eade* (1984) 14 A Crim R 186. *Einem v Edwards (*1984) 12 A Crim R 463, *Maher* [1987] 1 Qd R 171, *Brott v Reidel, & Castles* (1989) 44 A Crim R 29 and *Curry v Saunders* (1987) 30 A Crim R 186.

24 O'Regan, proposed new sections 202 and 232. Murray, 268.

Theft

15.1 (1) A person who dishonestly appropriates property belonging to another, with the intention of permanently depriving the other of it, is guilty of the offence of theft.

Maximum penalty: Imprisonment for 10 years.

(2) The following provisions of this Division apply to the offence of theft.

PART 3.2 THEFT

The core offence in the first half of this chapter is theft. It has six elements:[25]

(1) dishonesty;

(2) appropriation;

(3) property;

(4) belonging to another;

(5) intention to deprive permanently; and

(6) the requirement that all the elements exist at the same time.[26]

The drafting of section 15.1(1) differs slightly in form - but not in substance - from the definition in s302 of DP1 and the *Theft Act* model by deleting the references to "stealing" and "thief". The reference to "stealing" is unnecessary. The relationship between theft and receiving (s15.8) should be noted here. There is a very substantial overlap between theft and receiving stolen goods under the *Theft Act* model. This is because most acts of receiving (and other actions dealing with stolen goods) will amount to appropriations: by receiving stolen goods, the defendant also appropriates those goods (ie the defendant assumes the rights of the owner to ownership possession or control without the consent of the person to whom they belong). Section 16.8(5) provides that the defendant cannot be convicted of *both* theft and receiving in respect of the same transaction. As a practical matter, where the offence involves goods that have not already been stolen, the defendant will be charged with theft. Where the offence involves goods which have already been stolen, the defendant will be charged with receiving. The commentary to s16.8 gives fuller reasons for this approach.

25 Vic: s 72(1); ACT: s 94; cf NT: s 209(1).

26 See Fisse, 285.

Dishonesty

14.2 (1) In this Chapter, "dishonest" means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

(2) In a prosecution for an offence, dishonesty is a matter for the trier of fact.

Note: Section 15.2 affects the meaning of dishonesty in offences related to theft and section 17.2(3) affects the meaning of dishonesty in the offences of obtaining property or a financial advantage by deception. See also section 9.5 (Claim of right).

Dishonesty - interpretation

15.2 (1) A person's appropriation of property belonging to another is not dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps. This subsection does not apply if the person appropriating the property held it as trustee or personal representative.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.

Claim of right

9.5 (1) A person is not criminally responsible for an offence that has a physical element relating to property if:

(a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and

(b) the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.

(3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

14.2 and 15.2 - Dishonesty

The common law has two key fault elements for theft: the taking must be done fraudulently and with intention to permanently deprive. Intention to permanently deprive - which distinguishes the dishonest borrower from the thief - is dealt with below.

Two particular qualifications apply to the s15.1 offence. Section 15.2(1) modifies the general definition of dishonesty in s14.2 by specifying that a person who finds property and decides to keep it will not be dishonest if he or she believes that the owner cannot be found by taking reasonable steps. Section 15.2(2) provides that preparedness to pay does not necessarily absolve a person of dishonesty: the defendant may know, for example, that the owner would not part with his or her favourite car no matter that the full market price of the car was paid. Section 15.2(2) makes it clear that this could still be found to be dishonest.

For the reasons outlined in the commentary on s14.2, two of the *Theft Act* paragraphs specifying states of mind which are not to be regarded as dishonest are not included here: claim of right is dealt with in s9.5 of the *MCC* and belief in consent is subsumed within the general definition of dishonesty.

All the physical and fault elements of the offence must be present at the same time for the offence to be committed. This is a general principle of criminal responsibility and is codified by s3.2 of the *MCC*. Take the example of a person who becomes the owner of goods innocently but subsequently discovers a mistake has been made and dishonestly decides to keep the goods. In the absence of any special provision, there will be no theft because at that later time the goods no longer "belong to another". (But note s15.3(2) and s15.5(3) in relation to this sort of situation.)

Appropriation - interpretation

15.3 (1) Any assumption of the rights of an owner to ownership, possession or control of property, without the consent of a person to whom it belongs, amounts to an appropriation of the property. This includes, if a person has come by property (innocently or not) without committing theft, any later such assumption of rights without consent by keeping or dealing with it as owner.

(2) If property or a right or interest in property is or purports to be transferred or given to a person acting in good faith, a later assumption by the person of rights which the person had believed himself or herself to be acquiring, does not, because of any defect in the transferor's title, amount to an appropriation of the property.

s15.3 - Appropriation -

The *Theft Act* definition of appropriation treats "any assumption of the rights of the owner" as an appropriation. By contrast, the common law equivalent of this element of theft required a taking and carrying away without the consent of the owner. The *Theft Act* term is more abstract on its face than the common law. It is possible to assume the rights of an owner in relation to goods without touching them: to point to someone else's car and offer to sell it would amount to an appropriation.[27] The true breadth of the term has been the subject of considerable controversy.

The first view is that "appropriates" is the equivalent of the old term "convert" and has as its natural meaning a one-sided transaction which is *adverse* to the owner. This was the view expressed by the House of Lords in *Morris* in 1984. But *Morris* conflicted with the second view expressed in 1972 in another House of Lords case, *Lawrence*. The majority held that an appropriation could occur even if the owner consented. In 1992 in *Gomez*, the majority of the House of Lords resolved the conflict in favour of the second view. It overturned the *Morris* view and held that appropriation is neutral and not to be read as importing the common law concept of "without the consent of the owner" (a phrase which the majority found to have been deliberately omitted from the new definition of theft). There was a powerful dissent from Lord Lowry. *Gomez* has been subjected to strong criticism. For example, the leading commentator on the law of theft has commented:

> The majority gave scant consideration to the merits of the two views [ie *Lawrence* versus *Morris*]. The proposition in *Lawrence* was *ratio decidendi*, that in *Morris obiter dictum*, and that was good enough for the majority. They thought it would serve no useful purpose to seek to construe the Act by reference to the CLRC Report. Lord Lowry who did refer to the Report, demonstrated convincingly in his dissenting speech that it was the dictum in *Morris* which truly represented the intention of the CLRC and therefore that of the Parliament which enacted the CLRC's proposals with no material change. . . Sadly only Lord Lowry was prepared to give these words their ordinary meaning and the decision of the majority excludes it."[28]

The consequences of the distinction can be demonstrated in an example based on *Lawrence*. Say a taxi driver deceives a foreign traveller by telling her that the fare for a journey is $50.00. In fact it is $20. The customer hands the driver her purse and allows the driver to take whatever money is necessary. The driver takes $50.00. On the neutral view of appropriation, the driver could be

27 Vic: s 73(4); NT: s 209(1). The act of appropriation is complete when the transaction involving the assumption of rights is finished: see Smith, 2-42.

28 See *Morris* [1984] AC 320. Cf *Lawrence* [1972] AC 626 and *Gomez* [1992] 3 WLR 1067. Smith, 12-13.

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convicted of either theft (despite the fact that the victim consented to the defendant taking the money) or obtaining property by deception. On the "adverse interference" approach, the defendant could only be convicted of obtaining property by deception: because of the victim's consent, the taking would not amount to an appropriation.

The Committee has been faced with a choice between these views. The choice has conceptual and practical consequences. First, as noted in the discussion of dishonesty, if virtually any dealing with goods counts as an appropriation, the more work dishonesty has to do to distinguish theft from innocent transactions. Although the Committee has placed considerable reliance on the concept of dishonesty - especially for the difficult cases - it is obviously preferable to rely on more clear-cut criteria where possible. Second, for reasons outlined in detail below, the Committee has decided to retain the distinction between theft and fraud. This decision was strongly supported in submissions. The effect of *Gomez* is to collapse the distinction between theft and fraud because all obtaining by deception cases will also be theft. This is because under *Gomez*, consent is not relevant to appropriation. MCCOC has concluded that this strays too far from the central and commonly-understood meaning of theft as involving non-consensual takings. So far as possible, the law should reflect common understandings of offences as basic as theft and fraud.

In DP1, the Committee suggested that appropriation be defined as "any adverse interference or usurpation of the rights of an owner . . ." (s302.4). This codified the judgment in *Morris* which has been accepted in Victoria on this point and is codified in the ACT legislation.[29] Although a number of submissions supported this approach, Mr I Leader-Elliott criticised the words "adverse" and "usurpation" for conveying specious certainty and not distinguishing theft and fraud: if the defendant deceives the victim, the defendant has adversely interfered with the victim's rights. He suggested that the key concept here is consent, "a robust concept which provides a base for vigorous and intelligible argument." MCCOC agrees with these points and they are reflected in the drafting of s15.3(1).

The practical consequences of maintaining the distinction between theft and fraud in cases like *Lawrence* and *Gomez* are not great whichever way it is resolved. The penalty for both offences is the same. If all deception cases are charged as obtaining by deception, there will be no difficulty in obtaining a conviction. The difficulty in *Lawrence* and *Gomez* arose because the prosecution made a mistake and charged the defendant with theft instead of fraud and there were

29 *Morris* was accepted in *Baruday* [1984] VR 685 and *Roffel* [1985] VR 511. But note that *Baruday* accepted that the victim's consent was vitiated by the deception. This was based on *Lawrence.* But *Gomez* has now decided that consent is no part of appropriation under the English Act. In any event, for reasons outlined below in relation to mistake, if mistakes of this sort do not vitiate the passing of ownership in the goods - and they do not - it is hard to see how they can be said to vitiate consent for the purposes of appropriation. The ACT provision is s96(1)(b).

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no provisions for obtaining alternative verdicts. If the defendant had been charged with obtaining by deception there would have been no difficulty in obtaining a conviction. Under s15.3(1), if the defendant were charged with theft in a case where the property had been obtained by deception, the result would be not guilty of theft because the victim consented to the appropriation. This consent is not vitiated by fraud.[30] As suggested in DP1, this difficulty can be cured by making obtaining by deception an alternative verdict to theft. Submissions favoured this solution but suggested that it should also work in reverse so that if fraud was wrongly charged it would also be possible to convict of theft. Section 17.2(6) does this. This approach appears to be supported by Williams and Weinberg and would not appear to involve injustice provided that a satisfactory mechanism to prevent the defence being ambushed was in place.[31]

The issue of consent in cases where there are multiple owners requires special comment. Sections 15.3(1) and 15.5(6) combine to require that *anyone* to whom the property belongs consents to having their rights assumed ("...without the consent of *a* person to whom it belongs..."). Thus in cases where an object belongs to a number of people - as can be the case under the *Theft Act* - if the consent of any one of them is missing at the time of the assumption of their rights, an appropriation may occur. That does not mean that the defendant is automatically guilty of theft. For example, if the defendant did not know of the other owner's interest, then the defendant lacks the fault element for an appropriation (knowledge about the lack of consent) and is not dishonest. On the other hand, a defendant who knows full well of the other owner's interest and dishonestly proceeds to assume those rights cannot rely on the consent of another co-owner to deny the appropriation. Assuming the presence of the other elements, such a defendant will be guilty of theft. So where one co-

30 There is one issue to be clarified here. It has been suggested on the basis of *Lawrence* that in deception cases, the deception vitiates the consent to appropriation (see, for example *Baruday* [1984] VR 685 and Weinberg and Williams 98). This is not consistent with the law that ownership passes despite fraud (*Prince* (1868) LR 1 CCR 150 - ownership of goods passes despite the fact that the cheque in payment was forged) or mistake (except mistakes or fraud of a very fundamental kind: the nature of the act or the identity of the transferee). Recent High Court authority in contract law points in the same direction: *Taylor v Johnston* (1983) 151 CLR 422. It is not logically consistent to say that consent for the purposes of appropriation is vitiated by fraud or mistake but not vitiated for the purposes of transferring ownership of the property. In any event, *Lawrence* was decided on the basis that consent was not necessary for an appropriation, not that the consent was vitiated. The issue seems to be a legacy of logical anomalies in the distinctions between larceny by a trick and obtaining by false pretences. It is preferable to avoid this kind of inconsistency and the artificiality of saying that there was no consent when in fact there was a consent, albeit one obtained by fraud. This is the fundamental distinction between theft and fraud and the existence of the fraud offence removes the need to torture logic. See generally, Virgo, "When is Consent not Consent? (When it is Vitiated by Mistake)" [1995] 6 *Archbold News* 6.

31 Williams and Weinberg, 186-190. Currently, NSW: s183 allows an alternative verdict of larceny in cases charged as fraud.

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owner of a painting sells it to the defendant, and the defendant knows that the other co-owner does not and would not consent to the sale, the defendant cannot rely on the consent of the one co-owner to deny appropriation.

- *Which rights?*

However, this still leaves open the question of *which* rights of an owner are protected. "Any of the rights of an owner" is very broad. It might be, for example, that sitting on the bonnet of another person's car could amount to appropriation because this is one of the owner's rights. Certainly, sitting in the back seat of a stolen car has been held to be an appropriation for the purposes of theft of a car in Victoria. The issue has practical importance in cases where the intent to permanently deprive is effectively removed as an element of the offence because the case involves things like money (fungibles) where the defendant will intend to permanently deprive the victim of those particular notes. Or it might be that the defendant assumes some minor right of the owner permanently (eg to write on the first page of her book, which might be wilful damage but is hardly theft).

In an attempt to restrict the concept of appropriation the English Court of Appeal has recently ruled that not every *handling* of goods amounts to an assumption of the rights of an owner. For example, it was said that picking up an item that had fallen on the supermarket floor and putting it back on the shelf would not amount to an appropriation. It is difficult to see why doing this is not one of the "rights of an owner". On the other hand, it is easy to agree that this sort of assumption of the owner's rights is too trivial to count as an appropriation. In view of these considerations, the rights to be protected by the offence of theft should be statutorily specified as rights to ownership, possession or control. Section 15.3(1) does this.[32]

15.3(2) - Bona fide purchaser/recipient

Section 15.3(2) covers cases where a person innocently acquires property (eg goods) and subsequently discovers that the person from whom he or she received the goods did not have the right to dispose of them, usually because the goods were stolen. For example, a person sells a car to the defendant who was acting in good faith. Later the defendant finds out that the first person had stolen the car, but the defendant decides to keep it. Despite the fact of payment, this is either dishonest or liable to be regarded as dishonest and the other elements of the offence of theft are present. The defendant could not rely on the consent of the thief because he or she does not have the consent of the owner as required by s15.3(1) and s15.5(6). Section 15.3(2) prevents this from being theft by deeming it not to be an appropriation.

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32 The Victorian case of appropriating a car by riding in the back seat is *Woodrow* (1987) 26 A Crim R 387. The English Court of Appeal case is *Gallasso* [1993] Crim LR 459. On intent to permanently deprive, see Williams and Weinberg, 413.

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Under the *Theft Act*, where the defendant was *given* the car, the analogous section to s15.3(2) does not operate because it only protects transactions which were "for value". Both are situations where the defendant was honest at the point he or she acquired the goods and the culpability derives from failure to return the goods. As in other situations where the defendant discovers that goods belong to another subsequent to acquiring them (eg the mistake cases - see below), the fact that the defendant did not initiate a dishonest transaction distinguishes him or her from the thief or the fraudster. Although the defendant may have paid for the goods in the one case but not the other makes some difference to the assessment, payment is not enough of a difference to warrant conviction for theft in one case but not the other. They are also substantially different from the case of a person in possession of goods on some basis of trust (eg an employee or a bailee) who makes off with the goods. In both these cases, the defendant initially believed he or she had become the owner of the goods. MCCOC has concluded that as a matter of consistency, the section should be widened slightly to include the *bona fide* recipient of a gift.[33]

However, the limitations on this exemption should be noted. If the defendant sold the car to another - either expressly or impliedly representing that he or she was the true owner - he or she would be guilty of obtaining the purchase price by deception. This is because the defendant does not obtain ownership of the car and the real owner could claim it back from the defendant or anyone to whom the defendant sold it.[34]

33 It should be noted that in both cases, the defendant would not be guilty of receiving stolen goods because there was no dishonesty at the point of receipt (except in Tasmania and the ACT which define receiving to include dishonest possession). In all jurisdictions other than South Australia, both cases would amount to unlawful possession unless the defendant could satisfy the court that he or she had a reasonable excuse. Where the defendant had found out the goods were stolen, even where he or she had paid, it is at best uncertain whether the court would accept such an excuse.

34 Smith, 2-37 and 2-68.

Property

14.4 In this Chapter:

"property" includes all real or personal property, including:

(a) money; and

(b) things in action or other intangible property; and

(c) electricity; and

(d) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of a person;

Property - interpretation

15.4 (1) A person cannot commit theft of land or things forming part of land and severed from it by the person or by the person's directions, except in the following cases:

(a) when the person is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and the person appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in the person; or

(b) when the person is not in possession of the land and appropriates any thing forming part of the land by severing it or causing it to be severed, or after it has been severed; or

(c) when, being in possession of the land under a tenancy, the person appropriates the whole or part of any fixture or structure let to be used with the land.

(2) For the purposes of this section:

(a) land does not include incorporeal hereditaments;

(b) tenancy means a tenancy for years or any less period,

and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and let is to be construed accordingly.

14.4 and 15.4 - Property

The common law basically restricted theft to tangible things. The Code provisions follow the Victorian, NT and ACT model and widen the range of property that can be the subject of theft or related offences. The general definition of property for this chapter covers personal and real property, tangibles and intangibles. So, for example, a bank balance can be stolen by someone who dishonestly debits another person's account.

However, the full extent of the definition of intangible property is not clear. The *Theft Act* definitions of property have been criticised for not covering breaches of confidential information, a substantial issue given the importance of information in the computer age. Copying a list of names from a confidential customer list does not amount to theft and it does not matter whether the list was in a filing cabinet or on a computer disk. Mere breach of a copyright or use of a trade secret might involve breach of the copyright or the trade secret but would not be theft (assuming a trade secret amounts to intangible property) because there is no intent to permanently deprive the owner. These are problems that generally concern the protection of confidential information (including data stored on computers). MCCOC has decided not to deal with this issue in the context of theft.[35]

The common law of theft also did not recognise electricity as property and it was necessary to make special provision for misappropriation of it. The same did not apply to gas. There does not seem to be any valid reason to continue to exclude electricity from the definition of property. A person who bypasses the electricity meter or fraudulently obtains electricity should be liable to conviction for theft or obtaining property by deception as he or she would be if gas or water were the item obtained. Section 14.4 does this.

Section 14.4 also includes wild creatures which are normally kept in captivity or have been (or are being) reduced into captivity (eg a wild pig which has been shot by a hunter). Otherwise wild creatures cannot be the subject of theft. In the *Theft Act* this provision was located in the definition of property in relation to theft alone. MCCOC has decided that it should be in the general definition section. There is no reason why captive wild animals should not be the subject of a charge of obtaining property by deception.

Property is defined more narrowly for the offence of theft (s15.4). Generally, it is not possible to commit theft in relation to land or things forming part of the land and severed from it by the person.[36] The exceptions are where:

(a) a trustee appropriates land by dealing with it in breach of trust;

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35 See Fisse, 315.

36 Vic: s71(1); ACT: s93; NT: s1. England, Victoria and the NT retain the exclusion of land from the ambit of theft. Vic: s73(6); NT: s209(2). The exception was not retained in the ACT.

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(b) a person who is not in possession of the land severs something forming part of it;

(c) a tenant steals a fixture.

These restrictions appear to be based on the concept of theft as involving things that can be taken and carried away. Land can be the subject of the separate fraud offence and that is generally the more appropriate way of dealing with dishonesty in relation to land. DP1 canvassed whether land should be the subject of theft, for example where a person moves a fence in order to appropriate another person's land. While numerous submissions favoured extending the provisions to include land, to do so may trespass on areas better dealt with by the civil land laws. Indeed if the defendant adversely possessed the land for 15 years, he or she would become its owner. It would seem inconsistent if the defendant could also be guilty of theft for the same conduct. There are no demonstrated problems justifying the proposed extension. MCCOC concluded that although including land may appeal to logic, there were uncertainties and the benefits were hard to identify.

Person to who property belongs

14.5 For the purposes of this Chapter, property belongs to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).

Belonging to another - interpretation

15.5 (1) If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust. Accordingly, an intention to defeat the trust is an intention to deprive any such person of the property.

(2) If a person receives property from or on account of another, and is under a legal obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds belong (as against the person) to the other.

(3) If a person gets property by another's fundamental mistake, and is under a legal obligation to make restoration (in whole or in part) of the property or its proceeds , then to the extent of that obligation the property or proceeds belongs (as against the person) to the person entitled to restoration. Accordingly, an intention not to make restoration is an intention to deprive the person so entitled of the property or proceeds, and an appropriation of the property or proceeds without the consent of the person entitled to restoration.

(4) For the purposes of subsection (3), a fundamental mistake is:

(a) a mistake about the indentity of the person getting the property or a mistake as to the essential nature of the property; or

(b) a mistake about the amount of any money, direct credit into an account, cheque or other negotiable instrument if the person getting the property is aware of the mistake at the time of getting the property.

(5) Property of a corporation sole belongs to the corporation despite a vacancy in the corporation.

(6) If property belongs to 2 or more persons, a reference in this Division to the person to whom the property belongs is a reference to all those persons.

14.5 and 15.5 - Belonging to another

For the purposes of this chapter, the basic definition in s14.5 provides that property belongs to any person who owns it, or has any other proprietary right or interest in it, or who has possession or control of the property.[37] One effect of the section is that co-owners or people with different rights to a piece of property can be guilty of theft from one another. For example, one owner of property can be guilty of theft from another owner (eg theft by one business partner from another), or an owner can be guilty of theft by taking his or her property away from someone who has possession or control of it (eg an owner who dishonestly took back his or her own goods from a pawnbroker). The owner cannot deny appropriation by relying on his or her own consent to the appropriation. Section 15.3(1) and 15.5(6) requires the consent of all those to whom it belongs. In the example, the owner of the pawn shop has not consented to the appropriation of his or her right to possession.

The definition in s14.5 also provides that property also belongs to people who have any proprietary right or interest (not being an equitable interest arising either from an agreement to transfer or grant an interest, or from a constructive trust). One example of the effect of this is that a trustee (who is the legal owner of the trust property) who dishonestly appropriates trust property will be guilty of theft from the beneficiaries (who do not *own* the trust property but do have an equitable proprietary interest in the trust property). Where there is no specific beneficiary (eg in the case of a trust for general public purposes), s15.5(1) makes this theft.

However, equitable interests arising from agreements to transfer or grant an interest (eg to sell land or shares) are excluded. These equitable interests arise by the operation of legal rules but only in relation to contracts which are specifically enforceable. For example, the defendant agrees to sell a valuable painting to the victim. Before the sale goes ahead and the painting is transferred, the defendant gets a better offer and sells it to X. In general, contracts agreeing to sell goods are not specifically enforceable but they are when the goods have special qualities. Hence, a contract like the one in the example would be specifically enforceable and the victim would have an equitable interest in the painting. However, the framers of the *Theft Act* judged that this conduct should not be theft and that civil remedies were sufficient. The qualification in s14.5 means that this is not property belonging to another and therefore not theft.[38]

37 Vic: s 71(2); ACT: s 95(1).

38 See Smith 2-57. Cf cases where the contract is for the sale of property (cf agreement to sell) and property in the goods passes to the victim. Then the defendant would be guilty of theft. This involves complex questions about the passing of property in contracts for the sale of goods. See Smith, 2-103 - 2-104. As Smith points out, the objective element of dishonesty would need to be employed here to save the defendant who is ignorant of the complexities of the civil law but who would be entitled to re-sell the goods at civil law even though he or she was unaware of that right.

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Similar considerations arise in relation to constructive trusts. In an English case, the proprietor of a tied pub operated it on the basis that he would only sell the brewery's beer. In fact he also sold some of his own home brew. He was charged with theft on the basis of an argument that he was a constructive trustee of the proceeds of the sale of the home brew and that the brewery had an equitable proprietary interest in the proceeds. The Court of Appeal found that no constructive trust arose in these circumstances and, in any event, rejected the notion that a person should be guilty of theft based on the operation of such intricate legal concepts which strayed so far from ordinary conceptions of theft. The same point applies to constructive trusts generally, such as have been found to arise in the case of mistaken overpayment. Hence, s14.5 extends the qualification contained in the *Theft Act* so that equitable interests arising from constructive trusts do not fall within the definition of property belonging to another. Constructive trusts - based on equitable notions of unconscionability - may be appropriate for recovery in civil actions, but they stray too far from the common conception of theft and the much more culpable sort of dishonesty involved in theft to form part of the definition of the offence of theft. Their ambit is uncertain and likely to expand. To attach the boundaries of theft to such an uncertain concept would offend the important principle that the criminal law should be knowable in advance. No doubt that principle calls for judgements of degree on occasion. On this occasion in relation to constructive trusts and the law of theft, the Committee's judgement is to agree with what the Court of Appeal said:

> . . . the court should not be astute to find that a theft has taken place where it would be straining the language so to hold, or where the ordinary person would not regard the defendant's acts, though possibly morally reprehensible, as theft.[39]

The *general* definition of property belonging to another contained in s14.5 is supplemented for the purposes of the offence of theft by s15.5. So, for example, if the defendant receives money from another person and is under an obligation (this must be a legal obligation) to retain and deal with that money in a particular way but the defendant deals with it another way, the money is said to belong to the victim. The cases have held that the obligation must be legal rather than

39 *Attorney-General's Reference (No 1 of 1985)* [1986] 1 QB 491, 503. See too *Tarling* (1979) 70 Crim App R 77 in relation to secret profits and *A-G for Hong Kong v Reid* [1994] 1 AC 324 which found that a constructive trust on behalf of the principal arose in a bribery case. The overpayment case is *Chase Manhattan Bank* [1979] 3 All ER 1025, a civil case on constructive trusts. In Goulding J's lengthy discussion of the authorities in the *Chase Manhattan Bank Case*, it does not occur to any of the judges that the constructive trustee might be guilty of theft by keeping the overpayment. See generally Smith 2-57 - 2-58, and 2-70; and ATH Smith, "Constructive Trusts in the Law of Theft" [1977] *Crim LR* 395. ATH Smith cites (at 397) one commentator who has doubts about constructive trusts as proprietary interests because the tendency to impose constructive trusts to avoid injustice between parties may undermine principles of property law (cf the US approach of treating them as a remedial rather than substantive institution).

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moral. This is made explicit in the *MCC* (s15.5(2)). The application of this provision will depend very much on the facts of the transaction. The most difficult cases involve cash deposits. The section only applies if the particular cash is to be used, for example for the purchase of tickets. If the cash is to be mixed with the general cash of the business and there is a liability to provide tickets or a refund at a later time, then the cash ceases to belong to another. There is a debt to the depositor and the situation is dealt with on the normal principles relating to debtors and creditors.[40]

15.5(3) - Mistake

A problem arises when the victim makes a *fundamental* mistake and gives the defendant some property; the defendant does nothing to induce the mistake. Fundamental mistakes are mistakes about the identity of the defendant, the essential nature of the property, or the quantity of the goods (but not the amount of money). The problem is whether the victim's mistake is so fundamental that it vitiates the consent to the defendant appropriating the property and the victim's intention to transfer ownership of the property to the defendant. Other sorts of non-fundamental mistakes (eg the year of manufacture of a car) do not give rise to this problem. These mistakes do not vitiate consent or intent to pass ownership and the defendant does not incur any criminal liability. However, in the case of fundamental mistakes, if the defendant decides to keep the goods the question is whether he or she should be guilty of theft.

There are two situations relating to fundamental mistakes: (i) where the defendant knows of the mistake at the time ("T1") of transfer and decides to keep the goods; and (ii) where the defendant does not know of the mistake at T1 but discovers it later ("T2") and then decides to keep the goods. At common law in England, the defendant was guilty of theft in both T1 and T2 situations. The leading case is *Middleton,* where the defendant went to withdraw money from his savings account. The defendant was authorised to withdraw 10/- but the teller looked at the wrong authorisation and by mistake gave him £8/16/10 intended for another customer. Middleton realised the mistake but took the money and left. He was charged with larceny. Common law larceny required proof that the defendant fraudulently took and carried away, without the owner's consent, property belonging to another with intent to permanently deprive. These elements all had to be present at the time of the taking. Middleton was convicted and his appeal was eventually heard by a court of 15 judges who upheld the conviction 11 to 4. The minority said it was not theft because the victim consented to the taking. The majority favoured conviction but for a wide variety of differing reasons. The major group of 7 judges found that the victim's mistake as to Middleton's identity and the defendant's knowledge of the mistake at T1 had negated the victim's consent to the taking and the victim's

40 See *R v Hall* [1972] 3 WLR 381. See Smith 2-62ff.

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intent to convey ownership. On this analysis, two elements of larceny which were apparently missing - a taking without consent and property belonging to another - re-appeared.

The more difficult cases arise when the defendant only finds out about the mistake later at T2 and then the defendant decides to keep the property. This came up in the case of *Ashwell* where the defendant asked his friend to lend him a shilling outside a pub one night. In the dark, the victim passed over what they both thought was a shilling but was in fact a sovereign (20/-). Ashwell did not discover the mistake until later and cashed the sovereign. He was convicted of larceny and the result of the appeal was that the judges were divided 7:7. The effect of this was that the conviction stood. The prevailing view was that the taking did not occur at T1 when the coin was handed over. Their view was that the appropriation did not occur until T2, when the defendant discovered what the coin really was, namely a sovereign. At T2, on the authority of *Middleton,* the mistake as to the nature of the subject matter meant that there was no consent to the taking and that ownership had not passed (ie it was still property belonging to another). The opposing view was as follows. The taking occurred at T1, was with consent and occurred at a time when the defendant lacked fraudulent intent. At T2, when the intent became fraudulent, there was no taking without consent and ownership of the property had passed to the defendant.

It is useful to contrast these cases with the pre *Theft Act* case of *Moynes v Coopper* where the defendant received an advance of wages during the week but by mistake, the wages clerk put the full amount in the defendant's pay envelope at the end of the week. The defendant discovered the mistake at T2 when he opened the envelope and he decided to keep the excess. There was no *fundamental* mistake here: the victim knew the amount and knew the defendant's identity. Therefore it could be said that neither the consent to the taking nor the intent to pass ownership had been negated. The defendant was acquitted.

In Australia, the majority judges in the High Court case of *Ilich* expressed their disapproval of the reasoning in *Middleton* and *Ashwell*. *Ilich* was a decision on the WA Code but in the course of the decision, the majority indicated its agreement with the reasoning in *Potisk* (a SA Full Court decision on common law larceny which had also rejected the English cases).[41] In *Ilich*, the High Court ruled 4:1 that cases where property passes because of a non-fundamental mistake are not theft under the Codes because at the time of the conversion (ie T2) the property belongs to the defendant. Ilich, a locum vet, was abused by the vet who owned the practice (the owner) when he returned because of the state of the premises, etc. It seems that at T1, the owner threw down 3 envelopes

41 *Ilich* (1987) 162 CLR 110, per Wilson and Dawson JJ at 126 and Deane J at 143. Brennan J decided the case on the basis that the mistake was not fundamental. Mason CJ thought the case could be decided without reference to the English cases. *Potisk* (1973) 6 SASR 389.

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containing cash in payment of Ilich's fees, demanded that Ilich sign a receipt and get out. The owner had mistakenly thrown down 3 envelopes instead of 2. Only when he got home at T2 did Ilich find that the owner had paid him $500 too much. Ilich put the additional money in his car while he decided what he would do with it. He was charged with theft and convicted.

The reasoning of the High Court was that at T1, the owner knew the identity of the payee and the nature of what he was transferring, namely money. The normal presumption with money is that ownership passes with possession. Consent to the taking is not required under the WA Code, so that issue did not arise. At T2, the time of the "conversion", ownership of the $500 had passed to Ilich and therefore it was not property belonging to another. It is unclear what the High Court would have decided had Ilich realised the mistake at T1. Arguably, because of their disapproval of *Middleton* and approval of *Potisk*, the majority still would *not* have treated this as theft because of the owner's intent to pass ownership to Ilich at or about the same time as the conversion. Hence, even if Ilich knew the mistake at T1, it still was not property belonging to another. Only in the cases of fundamental mistake - where the intent to pass ownership is negated by the fundamental nature of the mistake - does it appear that the High Court would find larceny but even this is not certain because of the doubts about *Middleton*. The SA Full Court disapproved the rule in *Middleton*.[42]

Under the *Theft Act*, fundamental and non-fundamental mistakes can count as theft, even at T2. The *Theft Act* approach in this type of case is to say that the appropriation occurs at the time the defendant dishonestly decides to keep the money.[43] The question is whether the property belongs to another at this point. There are a variety of routes to the conclusion that it does. This is because the *Theft Act* has such a wide definition of property belonging to another: it includes any case where the victim has a proprietary right or interest or is under a legal obligation to return the property.

First, in cases of fundamental mistakes as to the identity of the transferee, the nature of the subject matter or the quantity of the goods, the intent to pass ownership is vitiated by the mistake and hence the property still belongs to the victim. If the defendant is aware of the mistake at either T1 or T2 and dishonestly decides to appropriate the property, he or she will be guilty of theft.

Second, English cases have held that where certain sorts of mistakes are made, although legal ownership of the property passes, there is a constructive trust and the transferor retains an equitable proprietary interest in the property transferred. Thus, the property still belongs to another under s5(1) of the English *Theft Act* because the person has a "proprietary right or interest" in it.

42 See *Middleton* (1873) LR 2 CCR 38; *Ashwell*(1885) 16 QBD 190; cf *Ilich* (1986) CLR 110; Potisk (1973) 6 SASR 389. See Williams and Weinberg, 35-47, 88-93.

43 See *Gilks* [1972] 3 All ER 280.

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The type of mistake here is not so fundamental as to prevent ownership passing but must be serious enough that it would be unconscionable for the defendant to retain the property; hence he or she becomes a constructive trustee for the victim who, as beneficiary, has an equitable proprietary interest in the property. Exactly when this is so will vary according to the essentials of the transaction, but it is wider than mistakes as to the identity of the transferee or the nature of the subject matter. In England, the Court of Appeal has cast doubt on the notion of using constructive trusts as a basis for the law of theft. For the reasons outlined above, s14.5 of the *MCC* specifically excludes constructive trusts from the ambit of property belonging to another and hence from the ambit of theft. Hence, this route to a conviction for theft is not open under the *MCC*.[44]

The third category of cases produces the most difficult problem. These are cases of non-fundamental mistake where the ownership does pass - such as in a case where a $200 debt is mistakenly paid twice. Under the *Theft Act*, this will be theft if the defendant is under a legal obligation to repay the money. This is because s5(4) of the *Theft Act* deems the property to belong to the victim if the defendant receives the money by another's mistake and is under a legal obligation to make restoration in whole or in part of the property or its proceeds.

Whether the defendant is under such an obligation is a matter of civil law and may include, among other things, decisions about the law of quasi-contract and whether a contract is void or voidable. If the contract is voidable, it may be argued that the defendant is not under a legal obligation to return the property until the contract is avoided. In many of these cases, the intricacies of the civil law are such that the defendant may be able to argue that he or she is not dishonest because he or she did not know that keeping the property was dishonest. However, defendants who take advantage of other's mistakes or who make secret profits may be regarded as dishonest. But that does not necessarily mean that such people are guilty of theft. Dishonesty is an important element of the law of theft and fraud but it is not the only element. Leaving such cases to be determined solely by reference to the concept of dishonesty avoids the basic question about whether the intricacies of the civil law appropriately mark out the boundary of the physical elements of theft. MCCOC has followed the Court of Appeal in rejecting the uncertain ambit of constructive trusts for the purpose of extending the boundaries of when property belongs to another for the purposes of the law of theft.[45]

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44 See footnote 39 and the accompanying text.

45 ACT: s 95(4); Vic: s 73(10); NT: s 209(5). The Vic and NT legislation refer simply to an *obligation*, but the ACT legislation specifically requires a *legal obligation*. It has been held, however, that a moral obligation is not sufficient: *R v Gilks* [1972] 1 WLR 1341. Professor Smith has argued that the subsection should only apply to void transactions, Smith: 2-46 - 2-47; Williams and Weinberg, 92ff take the opposite view. There are similar problems under the Codes. Under the Tasmanian Code, a defendant was found not guilty of theft after receiving an overpayment from a teller. The case led to a proposal to create a new offence of failure to account, but this was not enacted.

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There are strong arguments that the mistake cases - particularly the T2 cases - should not be treated as theft but as matters involving civil liability. The victim has brought about his or her own misfortune and it is unduly harsh to cast the onus of rectifying the situation onto the defendant on pain of committing theft. Thus, while the vet in *Ilich* is certainly entitled to sue to recover his money, he should not be able to have the locum arrested and prosecuted for theft, any more than any other creditor could if the debtor spent money on a holiday rather than paying the creditor's account. In some cases these overpayments will arise because the victim has chosen to set up business arrangements which are prone to error because this is cheaper than setting up a less error-prone system. Although the defendant may be under an obligation to return the property, the culpability is of a much less serious sort than theft or fraud where the defendant initiates a dishonest transaction. In these cases, the defendant has had temptation thrust upon him or her. To make a defendant like Ilich, or the recipient of a social security overpayment, guilty of theft in these T2 cases is to cast a duty to act in relation to innocently acquired property on pain of committing theft.

The potential width of this sort of liability is also of concern. In theory, it turns civil obligations into criminal ones where hitherto that has not been the case. It may be that all sorts of business transactions involving mistakes would now carry potential criminal liability. Smith mentions the following examples of cases which now would be brought within the law of theft. (1) A purchaser pays a vendor for goods; neither realised that the purchaser already owned them. The vendor refuses to repay the money. (2) An insurer pays money to an insured for goods that both believed to have been destroyed by fire. Subsequently the defendant finds the goods but does not tell the victim. (3) An employer pays a manager a lump sum to terminate her contract. It turns out that breaches of the contract would have entitled the employer to terminate the contract without payment. Neither knew of the breaches at the time of the contract. They subsequently discover this but the employee refuses to repay. The House of Lords and the Court of Appeal in England differed on whether the defendant was under an obligation to repay in the employment case. In all these cases (save the last), the defendant would be civilly liable to give back the money or goods mistakenly given to him or her. The question is whether it is justifiable to impose criminal liability for the offence of theft as well.[46]

In the Discussion Paper, the Committee argued for the *Theft Act* provision, including cases of voidable contracts. Submissions were about evenly divided about the issue. This mirrors the division of opinion about these sorts of cases going back to *Middleton* and *Ashwell*. For the reasons advanced in relation to constructive trusts, MCCOC has ultimately concluded that these civil law distinctions - while appropriate to the context of determining civil recovery -

46 The examples are taken from Smith, 2-77.

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are too obscure on the whole to define the boundaries of an offence as serious as theft. The employment example outlined above shows that even senior appellate courts may differ on whether civil liability exists in these cases. Given the division of opinion on these questions, MCCOC has decided to limit the use of the law of mistake to the existing Australian law as stated by the High Court in *Ilich*, subject to the qualifications outlined below. This yields the following rules:

- Mistakes as to the nature of the subject matter or the identity of the transferee will continue to negate the intent to confer ownership (s15.5(3) and (4)(a)). If the defendant knows of this sort of mistake either at T1 or T2, the property still belongs to the victim and the victim will be deemed not to have consented to its appropriation and the defendant will commit theft. Mistakes as to quantity are not included on the basis that they are not sufficiently fundamental: the person intends to hand over goods of that sort and there is no mistake about the identity of the transferee. They also do not provide a coherent basis for distinguishing fundamental from non-fundamental mistakes: one case treated mistakes in relation to the excessive number of bags of grain handed to the defendant as a fundamental mistake; on the other hand the court in *Moynes v Coopper* treated overpayment of money as a non-fundamental mistake.
- Other mistakes do not vitiate either the consent to the appropriation or the intention to pass ownership. The defendant does not commit theft if he or she knows of the mistake either at T1 or T2 because the property no longer belongs to another.
- Mistaken overpayments by cash, cheque or direct credit are a special case (s15.5(3) and (4)(b)). Where the defendant is aware of the mistake at the point of transfer(T1), the absence of what may be termed the inertia factor makes this case sufficiently like the finding cases to warrant the offence of theft. This raises a question about when the relevant time is. In a supermarket if the defendant immediately knows the overpayment at the register, this is clearly a T1 situation. On the other hand, in a case like *Ilich*, where the defendant does not become aware of the mistake until some time after transfer, it is clearly a T2 situation. the defendant will not be guilty of theft but the victim would be able to recover the money civilly. Cases where the defendant receives a cheque in the mail are more difficult. The Committee accepts the reasoning of Kriewaldt J in *Wauchope*[47] that this would not be theft because the defendant did not become aware of the mistake

47 *(1957) FLR 191.*

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until some time after the drawer intended to convey ownership (ie it is a T2 situation). Mistaken direct credits to bank accounts are similar to cheques. If a bank customer saw the teller mistakenly credit his or her account with $2000 rather than $200, and said nothing, that would be theft. In practice, direct credits will overwhelmingly be T2 cases because the defendant will only find out about the mistake some time after the transfer. If there was a fundamental mistake (eg wrong account because of a mistaken identity), the defendant would be liable for theft at T2. If it was a non-fundamental mistake (eg the correct account but the wrong amount), the defendant would not be guilty of theft. The victim would have civil remedies to recover what is in effect a debt.

Intention of permanently depriving - interpretation

15.6 (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself has, nevertheless, the intention of permanently depriving the other of it if the person's intention is to treat the thing as his or her own to dispose of regardless of the other's rights. A borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(2) Without prejudice to the generality of subsection (1), if a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return that the person may not be able to perform, this (if done for purposes of his or her own and without the other's authority) amounts to treating the property as his or her own to dispose of regardless of the other's rights.

15.6 - Intention to permanently deprive

The *Theft Act* retains the common law requirement of an intention to permanently deprive. The most fundamental question about this element of theft is whether it should be retained.

-Arguments for abolition

The Victorian *Theft Act* already makes "dishonest borrowings" of objects like cars theft. All the elements of theft - save the intent to permanently deprive - must be proved. Victoria and WA simply dispense with that requirement in a case of cars and the defendant is convicted of theft. (Other jurisdictions have separate unlawful use of a car offences, usually with lower maximum penalties)[48]. Given that this is thought to be just, it is inconsistent to require proof of intent to permanently deprive for other types of property. The element of dishonesty sufficiently specifies the culpability for the offence of theft. A person who dishonestly takes another's property, even though only temporarily, can fairly be regarded as equivalent to a thief.

This reform would also help resolve a further anomaly which occurs in relation to fungibles. In effect, intent to permanently deprive a person of a fungible (items which are interchangeable) - money, petrol, and the like - has already been removed. This is because the usual case will involve an intent by the defendant to permanently deprive the victim of *those particular notes* for example, and subsequently to replace them with an equivalent amount. This means that the question of whether the defendant is guilty of theft will depend on whether the borrowing was dishonest; intent to permanently deprive becomes a formality. This is arbitrary.[49]

There is a further argument for removing the intent to permanently deprive element from theft when it is compared to the offence of dishonestly obtaining a financial advantage by deception (s17.3). Because of the nature of financial advantage - the fact that the defendant is gaining an advantage may not involve depriving anyone else and that the whole point of the advantage may be for a temporary gain - proof of intent to permanently deprive is not part of the offence.

Given these points and the fact that the expanded definition of intent to permanently deprive - to include borrowings for a period or in circumstances making them *equivalent* to takings (s15.6(1)), for example - have attenuated this element to a very large extent, it would now be logical to abolish it altogether.

48 See the commentary on 16.5 and Vic: s73(14); WA: s 371A.

49 Williams and Weinberg, 118

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-Arguments against abolition

Theft is a serious offence of dishonesty. A conviction for theft can exclude a person from a wide variety of occupations. The offence of theft has - with minor exceptions - been restricted to permanent deprivations. Unless it can be clearly demonstrated that the requirement that the prosecution prove intent to permanently deprive causes substantial injustice, the scope of the offence should not be expanded.

To equate dishonest borrowings with theft is false. For example, say an employer unfairly dismisses an employee and requires that employee to clear out her office immediately. Because he or she has no convenient method of carrying her files and papers, the employee decides to borrow a filing cabinet, intending to return it within the next few days. She knows her employer would not agree, but because of the inconvenience and her disgruntlement, she takes the filing cabinet anyway. She returns it 10 days later. This should not be treated as theft as it would be if it becomes unnecessary to prove intent to permanently deprive. Partly, this is because the interest interfered with (temporary deprivation) is not sufficiently serious, and partly because the concept of dishonesty in theft is bound up with permanent deprivation. As in *Feely*, regarding a person who fully intends to return goods as dishonest for the purposes of theft strains the concept too far. It is because the person intends to return the goods that we do not regard her as a thief. The provisions in the *Theft Act* which extend permanent deprivation to a taking *amounting* to a permanent deprivation are fair extensions of the concept but they do not argue for removal of the underlying concept of permanent deprivation which gives them meaning.

Although dishonest borrowing clearly infringes property rights, theft should be reserved for cases where the victim has suffered a permanent loss; remedies in tort provide a sufficient response for temporary takings.

Conclusion

In DP1, MCCOC expressed the view that the element of intent to permanently deprive should be retained in the form of s15.6. Submissions firmly favoured this view. Only one submission favoured abolition of the requirement. Another suggested a separate offence of dishonest borrowing but the Committee believes that civil remedies are adequate to deal with this situation.

Given the retention of the element of intent to permanently deprive, DP1 raised several issues about its formulation.

Section 15.6(1) expands the concept of permanent deprivation by including an intention to treat the property as one's own to dispose of regardless of the rights of the other person. The subsection has been criticised for adding little to the concept of permanence and for importing inadvertence (negligence) into the meaning of intention. MCCOC believes that the additional wording is helpful as a codification of the common law position and judicial

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interpretations seem to favour that view. "Disposals" and "borrowings" will need to have a quality of permanence about them before the section can be satisfied (eg the defendant melts down the victim's antique bracelet intending to give back the melted silver). MCCOC does not agree that the expanded definition involves negligence. Rather it involves a sort of recklessness about permanent deprivation and as such is consistent with s5.6 of chapter 2 of the *MCC* which makes recklessness the basic fault element. Similar points apply to s15.6(2) relating to parting with property under conditions which the person may not be able to fulfil. This is treated as an example of disposing of property regardless of the other's rights in terms of s15.6(1).[50]

The ACT legislation also contains a provision to cover the case of a person who takes money not intending to return these notes but intending to return an equivalent amount[51]. Such a person will not be regarded as having an intent to permanently deprive. This deals with the case of one very common interchangeable item (fungible) - money - but not others. DP1 suggested that because the element of intent to permanently deprive is effectively deleted in the case of fungibles, the ACT provision ought to be broadened to deal with fungibles generally. Submissions generally favoured the view that there was a need to deal with this situation but it was pointed out that the s14.2 definition of dishonesty had solved the sort of problem dealt with in *Feely,* and that there was no need for the ACT type of provision. MCCOC accepts this view and has not included s302.14 from the Draft Bill in DP1.

50 See Vic: s 73(12); ACT: s97(1). The NT has a definition of 'depriving' which does not elaborate on the meaning of the basic concept; NT: s209(1). Williams and Weinberg, 103-107, Fisse, p 294, Smith 2-120 and see *Lloyd* [1985] QB 829. In relation to s15.6(2), see Vic: s 73 (12), (13); ACT: s 97(3); NT: s 209(1). See too, *Sharp v McCormick* [1986] VR 869.

51 ACT: s97(4).

General deficiency

15.7 A person may be convicted of theft of all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were appropriated over a period of time.

15.7 - General deficiency

Section 15.7 is an evidentiary provision which allows the prosecution to prove the defendant guilty of theft even though the prosecution cannot identify the particular sums of money or property taken if the prosecution can prove a general deficiency in the victim's money or property which is referable to the defendant's conduct. A typical example of this is where the defendant is an employee and takes small amounts of money from the till over a period of time. It is not necessary for the prosecution to identify the particular sums taken.

Division 16 - Offences related to theft

Robbery

16.1 A person who commits theft and, at the time of or immediately before or immediately after doing so:

(a) uses force on any person; or

(b) threatens to use force then and there on any person,

with intent to commit theft or to escape from the scene, is guilty of the offence of robbery.

Maximum penalty: Imprisonment for 12 years and 6 months.

Aggravated robbery

16.2 A person who:

(a) commits any robbery in company with one or more other persons; or

(b) commits any robbery and at the time has an offensive weapon with him or her,

is guilty of the offence of aggravated robbery.

Maximum penalty: Imprisonment for 20 years.

16.1- 16.2 - Robbery and Aggravated Robbery-

Robbery is the use of force *in order* to commit theft. Section 16.1 is based on s8 of the *Theft Act (UK)*.[52] In addition to the elements of the basic theft offence, s8 requires the prosecution to prove that the defendant used or threatened force immediately before or at the time of the theft for the purpose of stealing. If the use of force is merely coincidental to the theft - eg if the defendant hits the victim in an argument, the victim's wallet falls out of his or her pocket and the defendant then steals it - then the offence is not be robbery because the force was not used *with the intent* to steal. The defendant will be guilty of theft and assault.

Submissions generally favoured the provision proposed in DP1. However, s16.1 differs from the *Theft Act* provision and the provision in DP1 in that it includes force used immediately *after* the theft, as well as force immediately before and at the time of the theft. This is already the law in a number of jurisdictions. A number of submissions suggested that it be included in s16.1. Section 16.1 still requires that the force be causally linked to the stealing. The change to the section will avoid hair-splitting distinctions about the precise moment of appropriation: there will be no point in arguing that the force occurred moments *after* appropriation rather than before or at the time of appropriation. Take the example of a case where the defendant picks the victim's pocket and the victim then grabs the defendant's arm. If the defendant punches the victim in order to break away and make good the theft, it should be robbery. It should not matter that the force was used moments after the appropriation rather than moments before, because the force is so intimately tied up in the theft. The defendant has used force in order to steal and ought to be found guilty of robbery.[53]

Section 16.1 also differs from the *Theft Act* robbery provision by not including a separate offence of assault with intent to rob. The *MCC* will deal with failed robberies - where, for example, the defendant uses force or threats of force but the victim resists the defendant's efforts to steal his or her wallet - under the general attempt provisions in the *MCC* rather than as a separate offence of assault with intent to rob. In these cases the defendant will be dealt with for attempted robbery or attempted armed robbery under the general attempt provisions.

Section 16.1 requires the use of force (cf violence) against the person (cf property). This must be more force than is necessary merely to remove the object from the victim's person. Picking a pocket is normally not robbery but if the wallet became stuck as the defendant was removing it and a struggle ensued, it would be robbery.

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52 Vic: s75(1); ACT: 100(1) are in virtually identical terms. See Williams and Weinberg, ch 5; Smith, ch3.

53 The following jurisdictions include force immediately after the theft: NSW: s95; NT: s211; Qld: s409; Qld (New): s167; SA: s158, Tas: s240, WA: s391.
On the moment of appropriation in robbery, see Weinberg and Williams, 271-2; Smith, 3-08 - 3-10.

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Threat of force (s16.1(b)) does not require proof of a link between the person subject to the force or threat, and possession of the goods which are the object of the robbery. Thus a threat to a third person in order to get the victim to hand over property will be robbery. The only necessary link is the defendant's purpose in using the threat or force in order to steal. The section is drafted in terms of threatening force rather than "puts or seeks to put" *any* person in fear of force. This drafting is clearer than the *Theft Act* and it obviates the need for the Victorian amendment to the *Theft Act* provision necessitated by a case where the defendant threatened a shopkeeper by pretending he would harm a bystander who was in fact assisting the defendant and not put in fear. Under s16.1(b), the defendant would be caught because he had threatened to use force on another person; it would not matter that the bystander/accomplice was not put in fear. The nub of the offence is that the defendant appropriated the money from the victim by threat of force against the third person.

The threat must be to use force then and there. Threats of force at some time in the future, or against property, or other sorts of threat (eg to embarrass) are not included. However, the offence of blackmail does extend to these sorts of threats (see s18.1, below).

Section 16.2 provides a separate offence for aggravated robbery. The English *Theft Act* does not have such a provision but its maximum penalty for robbery is life. The Victorian and ACT provisions are limited to cases where the defendant is armed. But the *MCC* provision follows the situation in a number of jurisdictions which also treat robbery in company as an aggravating circumstance. One submission suggested, as is the case in some jurisdictions, that wounding in the course of a robbery should also count as aggravated robbery. MCCOC believes that this should be dealt with by charging the relevant separate offences relating to the infliction of injury.

The basic offence carries a 12.5 year penalty. Aggravated robbery carries a maximum penalty of 20 years.

Burglary

16.3 (1) A person who enters or remains in any building as a trespasser with intent:

(a) to commit theft in the building; or

(b) to commit an offence in the building that is punishable with imprisonment for 5 years or more and that involves causing harm to a person or damage to property,

is guilty of the offence of burglary.

Maximum penalty: Imprisonment for 12 years and 6 months.

(2) A person is not a trespasser merely because the person is permitted to enter or remain in the building for a purpose that is not the person's intended purpose, or as a result of fraud, misrepresentation or another's mistake.

(3) In this section, "building" includes:

(a) a part of a building; or

(b) a structure (whether or not moveable), a vehicle, or vessel, that is used, designed or adapted for residential purposes.

Aggravated burglary

16.4 A person who:

(a) commits any burglary in company with one or more other persons; or

(b) commits any burglary and at the time has an offensive weapon with him or her,

is guilty of the offence of aggravated burglary.

Maximum penalty: Imprisonment for 15 years.

16.3-16.4 - Burglary and Aggravated Burglary

The elements of the *Theft Act* offence of burglary are that the defendant enters a building as a trespasser with intent either to commit theft, or to commit a serious assault or damage to the building or its contents (defined in terms of assault or property damage offences carrying a maximum sentence of 5 years or more). Section 16.3 is based on s9 of the *Theft Act* and is a considerable simplification of the old basic offence of burglary and the associated offences designed to fill various gaps in the basic offence.[54] The definition avoids the old problematic common law distinctions between day and night, dwellings versus other sorts of buildings, and so on. Where relevant these matters can be dealt with on sentence.

The entry must amount to a trespass, in contrast with the common law approach which required a breaking plus an entry. Thus, to enter a house without permission through an open door would not be burglary at common law but it would be under the *Theft Act*. Because burglary is a criminal offence, the prosecution must prove that the defendant knew that he or she had no right to enter or was reckless about the right to enter.

It was thought that the concept of trespass would simplify the complexities that had grown up around the common law concept of "break and enter". However, when an entry constitutes a trespass is a matter of civil law: it depends whether the occupier of the premises or someone with authority gives licence to enter. In most burglary cases this element will be straightforward: the occupier will not have given permission and the defendant will know this full well. However, there are complexities in the law of trespass which rival those of the common law concept of "break and enter".

The first problem occurs when the defendant has licence to enter for one purpose but enters with a different purpose. For example in one case, the defendant's neighbour gave him the key to their house so that he could take care of it while they went away. He used the key to steal their goods. The High Court in *Barker* found that this went outside the purposes of his licence to enter, that the entry was a trespass and that he had therefore committed burglary. The more difficult case involves a shoplifter who enters a shop along with other members of the public but intends to steal. Their licence to enter does not extend to entry for the purposes of theft. On the other hand to describe this as burglary strains the concept of burglary well beyond its proper bounds. In *Barker,* two judges said that where the defendant had a *general* licence to enter, he or she did not become a trespasser simply because the victim would not have given permission had he or she known the victim's purpose. The question was the actual limit of the defendant's authority to enter. Second, they said that the prosecution must prove that the defendant knew he had no right to enter (or was reckless about this). That would usually be difficult to prove in shoplifting

54 *Vic: s76; ACT: s102.*

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situations as the defendant would usually think he or she was entitled to enter along with everybody else. The result would be not guilty of burglary but guilty of theft.

Murphy J in *Barker* thought the introduction of these concepts into the criminal law was too metaphysical and turned pilfering by cleaners, employees and shoplifters into burglary. Dawson J said it would be simpler to remove the notion of purpose altogether from this part of the law:

> Trespass is concerned with the physical violation of possessory rights and it would do no harm to principle to say that there is no violation of possessory rights where the act which would otherwise constitute the violation is permitted even if it is done for a purpose other than the purpose for which the permission is given.[55]

The Committee respectfully agrees with this view. In a case like *Barker*, it cannot be said that there has been a physical violation of the victim's possessory rights to restrict entry: he agreed to the defendant being on his premises, though not for the purpose of theft. The sort of violation involved in entry without any permission - the essence of burglary - is lacking. This is even more true in the case of shop-lifting. To include such cases in burglary - a significantly more serious offence than theft - erodes the basis for the distinction between theft and burglary. Although at some points the law of theft has to resort to the refinements of the civil law, this should be minimised. Hence, s16.3(2) provides that if the defendant is permitted to enter a building for one purpose, the fact that he or she enters the premises for another purpose does not make him or her a trespasser. In these circumstances, the defendant will not be guilty of burglary but will be liable for any other offence committed (eg theft). This will not completely remove the need to go into the terms of a permission to enter in some cases. For instance, take the example of a cleaner who has permission to enter premises on Mondays during the day to clean. If the cleaner entered on a Monday during the day but on this day intended to steal, by virtue of s16.3(2) he or she would not be a trespasser. The offence would be theft, not burglary. On the other hand, if the entry was on Saturday, or on Monday at 11pm, he or she would be outside the terms of the permission to enter, would be a trespasser and would be guilty of burglary.

Section 16.3 also catches the case of a person who enters, say, a shop without trespassing but who becomes a trespasser once inside the building. This can happen in several ways. Either the permission to be in the building can be revoked or it might expire, for example, because shop closing time arrives.

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55 *Barker* (1983) ALJR 426. Justices Brennan and Deane thought that the shoplifter's right to enter was so general as to include the right to to enter even if for the purpose of theft. Alternatively, they said that the shoplifter was likely to believe that he or she had a right to enter and hence would not be guilty of burglary. It is preferable to avoid this degree of complexity, see 437-8. See Murphy J at 432 and Dawson J at 441.

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Alternatively, the defendant may enter a part of the building for which he or she has no permission to enter. Following the *Theft Act*, DP1 did not include a provision specifically covering these sorts of "breaking out" situations. It was thought that in hiding in the store the defendant would be caught by the provision relating to entry into a part of the building where he or she had no permission to be. A number of submissions called for this to be clarified by including a provision equivalent to the existing "breaking out" provisions in some jurisdictions.[56] These submissions have been accepted and section 16.3(1) modifies the *Theft Act* provision by specifying that a person who *remains* in a building as a trespasser (cf *enters* as a trespasser) - for example, a person who hides in the shop as it is closing - intending to commit theft and then sneak away - is guilty of burglary. Clearly the defendant would be a trespasser either because he or she has no permission to be on the premises after closing time and remains as a trespasser; or he or she has no permission to be in that part of the building and enters that part of the building as a trespasser.

The second problem is when the defendant obtains entry by fraud or intimidation. At common law, these situations were treated as "constructive breaking and entering".[57] In the case of intimidation, there is no difficulty in saying there is no valid consent to enter and that the defendant is a trespasser. Indeed, such a person may well be guilty of robbery.

However, as discussed in relation to mistake, fraud does not generally negative consent. Only fraud (or mistake) as to the identity of the person or the nature of the subject matter vitiates consent. However, applying these principles to burglary leads to complex and contradictory results akin to those identified in *Barker*. Take the following examples. The defendant plans to steal a TV set from the victim's house. The defendant gives the victim a false name and falsely represents that he is a meter reader to obtain permission to enter the house. The victim allows him to come in. While the victim is not looking, the defendant steals the TV and leaves. This is a long way from the standard case of burglary where the defendant breaks into the house at night. However, on standard principles, the fraud as to the defendant's identity vitiates the consent, and the defendant is guilty of burglary. However, if the defendant gave his correct name, arguably there would be no fraud as to identity, merely fraud as to his attributes (that he was a meter reader) and his purpose (that he intended to read the meter). In that case he would be guilty of theft but not of burglary. If in fact he was a meter reader and intended to read the meter but also to steal the TV, there would be no fraud at all and he would be guilty of theft. On the

56 For example, SA: s168. But note that these provisions tend to require the initial entry to be accompanied by the intent to commit a relevant offence. Section 16.3 includes innocent entry followed by subsequent decision to remain for the purpose of committing a relevant offence.

57 On "constructive breaking" at common law: see Willaims and Weinberg, 279; Smith, 11-06 - 11-09. See too Virgo, "When is Consent not Consent? (When it is Vitiated by Mistake)" [1995] No 6 *Archbold News* 6, 8.

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other hand, if he did not intend to read the meter but just to steal the TV, it could be argued that the fraud about reading the meter was a fraud as to the subject matter of the transaction and this vitiated the consent. This would mean the defendant was guilty of burglary.

Reliance on the general rules about fraud and mistake does not offer a good basis for distinguishing these various cases. Objectively, the harm to the victim's interests is the same in all of these fact situations. And that harm is of a different and significantly lesser degree than the standard case of burglary in which there is no permission to enter at all. The passage quoted above from *Barker* is relevant again here. These cases should be treated like the cases where the person has permission to enter for one purpose but does so for another purpose. Cases where entry is gained by fraud or by mistake will also be deemed not to be trespasses for the purposes of burglary (s16.3(2)). The defendant will be guilty of theft. The courts can reflect the defendant's culpability in practising fraud or exploiting trust in the sentence imposed for theft.

The definition of building also can cause difficulty. It clearly covers structures of some size and permanence, and includes garden sheds and the like. Items under awnings or tarpaulins would not be covered. A carport or a pergola probably is not included but this is a matter of interpretation in any given case. However, part of the essence of burglary is stealing from places used as dwellings. Where people are living in structures which clearly are not buildings such as caravans, tents, boats, and cars, the law of burglary ought to protect them. Section 16.3(3)(b) covers these situations where the structure is used, designed or adapted for residential purposes.

Section 16.4 relies on the same aggravating circumstances for aggravated burglary as for aggravated robbery. The penalty for burglary is a maximum of 12.5 years and 15 years for aggravated burglary. Some submissions suggested other aggravating factors such as "at night" or "in a dwelling house". However, these other matters go to the essence of the basic offence and distinguish it from theft. They can adequately be dealt with in sentencing. On the other hand, the Law Institute of Victoria argued that burglary in company should not be an aggravating factor. Most submissions did not comment on these issues and may be taken to have agreed with the aggravating factors proposed in DP1. The Committee believes that being in company does aggravate the basic offence. The aggravating factors listed are consistent with the aggravating factors for robbery and sufficiently substantial to warrant the separate offence of aggravated burglary.

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Removing articles from buildings open to the public

The *Theft Act* contains an offence of removing articles from collections to which the public has access (s11). There is no need for an intent to permanently deprive. Victoria and the ACT adopted a similar offence in their adaptations of the *Theft Act* legislation. The penalty for the offence is a maximum of 5 years.[58]

The discussion paper argued that the rationale for a special offence not requiring intent to permanently deprive for this class of objects is not readily apparent. For the reasons outlined above, MCCOC has concluded that intent to permanently deprive should remain part of the law of theft, except for offences like "joy-riding" where there are strong reasons of public policy for a special offence to deal with a prevalent and serious type of behaviour. There do not appear to be such strong reasons in the case of this offence. Indeed, the offence appears to have been based on one or two controversial incidents in England, one of which involved blackmail.[59] Four submissions commented on this offence: two favoured abolition and two favoured inclusion. MCCOC has concluded that the offence should not be included in the Code but that it may be appropriate to include it in summary offences legislation.

> Recommendation
>
> The MCC should not contain an offence of removing articles from buildings open to the public.

58 Vic: s.78; ACT: s144.
59 Smith, 7-01.

Taking motor vehicle without consent

16.5 (1) A person:

(a) who dishonestly takes a motor vehicle belonging to another person; and

(b) who does not have the consent to do so from a person to whom the vehicle belongs,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

16.5 - Taking motor vehicle without consent

Some jurisdictions make unauthorised use of a motor vehicles or plane (and some include a boat) a separate offence. Under the *Theft Act* it is also a separate offence However, in Victoria (s73(14)) and WA (s371A) it is treated as *theft*, dispensing with the requirement of intention to permanently deprive.

The decision to treat unauthorised use of cars as an offence despite the absence of intent to permanently deprive can be justified as a matter of public policy by the prevalence of this type of behaviour and the interference with items which will often be the most valuable single item of property owned by the victim. However, the temporary nature of the borrowing and the stigma associated with theft - especially in view of the fact that a conviction for theft results in disqualification from a variety of jobs - does not justify treating illegal use of cars as theft. It should be a separate offence. Submissions accepted the need for this as a separate offence. Only one submission favoured the Victorian and WA approach of treating the offence as theft.

DP1 raised a question about what sort of vehicles should be covered. The wider the class of objects covered, the greater the case that the offence should apply to all property or that the intent to permanently deprive should be dropped from the offence of theft, an approach rejected by the Committee and by a large majority of submissions. As the submission from the Commonwealth DPP put it, given that the reason for the offence is the prevalence of car theft, there is a case for restricting the offence to cars. One submission suggested it be extended to boats and another that it extend to all conveyances. MCCOC has concluded that it is preferable to restrict the offence to its public policy basis, namely the prevalence of the illegal use of motor cars.

Section 303 in DP1 defined this offence in terms of dishonest appropriation. A submission from a NSW Crown Prosecutor pointed out that the width of the term appropriation and the absence of an intent to permanently deprive meant that sitting in the back seat of a car without the owner's consent, or damaging the car would fall within this offence.[60] The offence is not intended to be so broad. It is essentially concerned with the actual taking of cars without the owner's consent and does not require the abstraction of the offence of theft. Therefore it is simpler to return to the common law concept of a *taking* as s16.5 now does. This would include driving or rolling the car when the motor was not running. Consideration was given to making "driving" the physical element of the offence and giving "driving" the extended meaning it bears in a number of Acts to include moving the car without the engine running. Ultimately, "taking" was the preferred term; it has the additional advantage that it sits more easily with the fault element of dishonesty.

60 *Woodrow* (1987) A Crim R 387.

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The penalty for the offence proposed in DP1 was the same as for theft, 10 years. A number of submissions and the Melbourne consultation pointed out that this penalty was inconsistent with the absence of an intent to permanently deprive. MCCOC accepts the force of these submissions and recommends a maximum penalty of 5 years for this offence.

Making-off without payment

16.6 (1) A person who, knowing that immediate payment for any goods supplied or services provided is required or expected from him or her, dishonestly makes off without having paid and with intent to avoid payment of the amount due, is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

(2) This section does not apply if the supply of the goods or the provision of the service is contrary to law.

(3) For the purposes of this section, immediate payment includes payment at the time of collecting goods in respect of which a service has been provided.

16.6 - Making off without payment

Situations where the defendant innocently obtains goods or services knowing that immediate payment is required, but then sees an opportunity to make off without paying are not covered by theft or fraud. Common examples are self-service petrol stations, restaurants, taxis and hotels. For example, the defendant enters a service station intending to pay and fills the tank. *After* filling the tank, the defendant notices that the cashier is distracted with other customers and takes the opportunity to leave without paying. This is not theft because the ownership of the petrol passed to the defendant when she or he put it in the tank. Therefore, at the time of the dishonest appropriation, the petrol is not property belonging to another. Neither is it obtaining either property or a financial advantage by deception because the defendant does not practise any deception to obtain the petrol or the financial advantage - he or she just drives off. Had he or she driven in all along intending to drive off without paying, then there is a deception because the defendant's conduct in entering and filling the tank carries an implied representation - which is false in this example - that he or she intends to pay. In this example, the defendant could be charged with dishonestly obtaining the petrol by a deception.[61]

To deal with this situation, England and the ACT have created a separate offence of making off without payment carrying a maximum penalty of two years (cf the penalty for theft which is 10 years in the ACT).[62] MCCOC believes that this conduct is sufficiently serious to warrant the creation of the special offence, as did a very large majority of submissions.

Section 16.6 defines the offence. The physical elements of the offence are to make off without paying in circumstances where immediate payment for the goods or services is required. The words "making off" bear their normal meaning: departing from the place where payment is to be made in a way that will make the defendant hard to trace. Driving off from the service station, leaving the hotel or restaurant or getting out of the taxi and walking away are all examples of making off.

Whether immediate payment is required is a question of fact to be determined on the plain meaning of those words. Examples have been given of common situations. The section follows the *Theft Act* by partially defining this phrase to include collecting goods on which a service has been performed (eg repairs, s16.6(3)).

The offence does not apply to payment for illegal goods or services (s16.6(2)). Unlike the *Theft Act*, s16.6(2) does not except unenforceable transactions. Thus a child of 14 who made off with petrol would be liable for the offence in the same way as he or she would be liable for its theft. The fact that a contract for

61 *Greenberg* [1972] Crim LR 331, *Edwards v Ddin* [1976] 3 All ER 705 and *DPP v Ray* [1974] AC 370. See Smith, chap 5.

62 ACT: s107; s3 *Theft Act 1978*.

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payment would be unenforceable because the petrol is not a necessary does not appear to be a sufficient reason for exempting the child from the making off offence. It would also be incongruous to convict the child for making off if the goods were a necessary, for example food, but not if they were non-necessaries like petrol. A child over 10 can be convicted of theft in both cases. The same principle should apply to making off. The *MCC* has fixed the age of criminal responsibility at 10 (with a presumption against responsibility between 10 and 14). That is the only relevant consideration in relation to this offence.

The fault elements for the offence are dishonesty, and an intention to make off knowing that immediate payment is due, with the intent to avoid payment. Intent to avoid payment means to avoid payment altogether, not merely to delay payment.[63] Thus a restaurant customer who made off without telling the restaurant, intending to *delay* the payment would not satisfy this fault element even though such conduct may be dishonest. The need to prove intent to avoid payment altogether parallels the requirement of intent to permanently deprive in theft.

Dishonesty is defined in s14.2(1) and the same general considerations apply to this offence. If the defendant refuses to pay for a meal in a restaurant because he or she believes the food was bad or it was not what was ordered, etc, then he or she will not be dishonest. The defendant's claim will be more likely to be accepted if he or she openly tells the restaurant staff and leaves a contact number.

While the offence should be indictable, the culpability for such an offence is less than for theft and that should be reflected in a lower maximum penalty of two years.

63 *Allen* [1985] AC 1029.

Going equipped for theft, robbery, burglary or other offences

16.7 (1) A person who, when not at home, has with him or her any article with intent to use it in the course of or in connection with any theft or related offence is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

(2) For the purposes of this section, a **related offence** is robbery, burglary, an offence against section 16.5 or an offence against section 17.2.

16.7 - Going equipped for stealing

The *Theft Act* makes it an offence for the defendant to have any article for use in theft, burglary or cheat when not at home. Other jurisdictions have equivalent provisions though in some cases they are wider (eg going about with one's face blackened).[64] Any article will suffice for this offence so long as the defendant's purpose is to use it for theft, burglary or a cheat. Gloves to prevent leaving fingerprints would suffice, as would a screw driver to jemmy a window. The prosecution has to prove that the defendant knew he or she had the article and that he or she intended to use it for the purpose of theft, fraud or cheat.

This is a preparatory offence where the offence is committed well before it could be said that an attempt has occurred. It could be argued that the law should be restricted to attempt. However, these offences are of long standing and where it can be proved either from the nature of the article, admissions or other evidence that the defendant had the article for the purposes of burglary, theft or cheat, then it is justifiable to treat this as an offence.

Section 16.7 follows the *Theft Act* model with two exceptions. First, it applies includes articles intended for use in the offences of robbery and taking motor vehicles without consent Second, the *Theft Act* includes a subsection presuming that the person intends to use the article for theft etc, from the fact of carrying it. This is essentially an averment of a fault element contrary to section 13.6 of the *MCC*. Accordingly, it has been omitted. Where it can be shown that an article is made or adapted for theft, burglary or cheat (eg a device for deceiving gambling machines), that will be evidence from which inferences can be drawn that the defendant had the article for that purpose. Where the article is clearly adapted for use, the inferences and proofs are easily dealt with in the normal way. The more difficult cases involve articles which have legitimate uses and the presumption does not apply in those cases.

The penalty for the offence is 3 years which is consistent with its status as a preparatory offence.

64 Vic: s91; ACT: 116; NSW: s114; NT: s57(1)(e) *Summary Offences Act*; Qld: 425; Qld (New) s37; SA: s172; Tas: s248; WA: s407. Smith, ch 12; Williams and Weinberg, 312-4.

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Advertising for the return of stolen goods

The *Theft Act* contains a provision making it an offence to advertise a reward for the return of stolen goods with "no questions asked".[65] The rationale for this offence appears to be that it may encourage theft. It is a summary offence and carries a fine. MCCOC does not believe that such conduct should be included in the *MCC* and doubts whether it should even be a summary offence. To punish someone who has been the victim of a theft for attempting to get their property back - when the reality is that even with the advertisement there is little likelihood of that happening - is too harsh.

> **Recommendation**
>
> The MCC should not include an offence of advertising for the return of stolen goods with no questions asked.

65 Section 23; Vic: s89. See Smith 13-48.

Receiving

16.8 (1) A person who dishonestly receives stolen property, knowing or believing the property to be stolen, is guilty of the offence of receiving.

Maximum penalty: Imprisonment for 10 years.

(2) Property is stolen property if:

(a) it was appropriated or obtained in the course of any theft or any offence against section 17.2; or

(b) it was appropriated or obtained outside this jurisdiction in the course of an offence outside this jurisdiction (and that would have amounted to theft or an offence against section 17.2 if it had occurred in this jurisdiction); or

(c) it is (in whole or in part) the proceeds of sale of, or property exchanged for, stolen property and is in the possession or custody of the person who so appropriated or obtained the stolen property or who received the stolen property (or the proceeds or exchanged property) in the course of an offence against this section.

Stolen property does not include land obtained in the course of an offence against section 17.2.

(3) Property ceases to be stolen property:

(a) after the property is restored to the person from whom it was appropriated or obtained or to other lawful possession or custody; or

(b) after that person or any person claiming through him or her ceases to have any right to restitution in respect of the property.

(4) A person charged with theft may be convicted of receiving and a person charged with receiving may be convicted of theft. If the trier of fact is satisfied beyond reasonable doubt that a person has committed either theft or receiving but is unable to determine which of those offences the person has committed, the person is to be convicted of theft.

(5) A person may not be convicted of both theft and receiving in respect of the same property if the person retains possession or custody of the property.

(6) In proceedings for the offence of receiving, it does not matter whether the property concerned was stolen before or after the commencement of this section.

16.8 - Receiving stolen property

Most jurisdictions have an offence of receiving stolen goods and most also have a complementary offence of unlawfully being in possession of goods reasonably suspected of being stolen.[66] In DP1, the Committee argued that under the *Theft Act* model, receiving cases could be dealt with as theft. Because of the breadth of the concept of appropriation, any case of handling would amount to theft. It was suggested that this would obviate the need for the very complex receiving provision in the *Theft Act* and do away with the difficult problem that has arisen in some cases where the jury is satisfied that the defendant is guilty of theft or receiving but cannot decide which. However, the clear weight of submissions rejected this approach on the basis that the separate offence labelled as receiving stolen goods clearly corresponded with the common understanding of a form of criminality which is different from theft. To describe a receiver as a thief may be confusing to the person in the street. As in the case of fraud, there is something to be said for retaining categories that are widely understood by the public who do make a distinction between stealing and receiving stolen goods.

But there is also a substantive reason for retaining the separate offence. While all cases of receiving *stolen* property could be prosecuted as theft, the offence of receiving also extends to property *obtained by deception*. But in these cases, it would not be possible to prove theft because the property is appropriated with the consent of the owner and it ceases to belong to another (the owner intends to convey ownership to the defendant).[67] Also in cases where there was uncertainty about whether the goods had been stolen or obtained by deception - but it was certain that one or the other had occurred - it would not be possible to prove beyond a reasonable doubt that the goods belonged to another for the purposes of proving theft. MCCOC has concluded that a separate receiving offence should be included in this chapter. However, the Committee has chosen a much less complex form of the offence than that contained in the *Theft Act* model. The *Theft Act* attempts to graft a variety of complicity provisions into the basic receiving offence. It produces a complex and unwieldy offence with overlaps into the law of complicity. Section 16.8 of the *MCC* confines itself to

66 Handling: ACT: s113; Cth: no provision; NSW: s188; NT: s229; Qld: s433; Qld (New): s165; SA: s196; Tas: s258; Vic: s88; WA: s414. Unlawful possession: ACT: s527A; Cth: no provision; NSW: 527C; NT: *Summary Offences Act,* s61; Qld: *Vagrants, Gaming and Other Offences Act 1931*, s25; SA: *Summary Offences Act 1953*, s41; Tas: *Police Offences Act 1935*, s39; Vic: *Summary Offences Act 1966*, s26; WA: *Police Act 1892* s69.

67 Fraud as to the nature of the subject matter or the identity of the transferee would prevent ownership passing. It might be possible to argue that in other sorts of frauds, the victim retains an equitable proprietary interest or that the defendant becomes a constructive trustee for the victim but for the reasons advanced in relation to the mistake cases, these civil law doctrines are not a good basis for criminal liability.

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receiving. The normal rules of complicity and accessory after the fact apply to those who assist a thief or a receiver.[68]

The *Theft Act* changed the name of the offence from "receiving" to "handling". This name was thought to be more apt to cover cases involving intangible property. It also extended beyond receiving to activities like negotiating the disposal of stolen goods and other activities of the "fence". Like the *Theft Act*, s16.8 will apply to any property capable of being stolen including intangible property (thus it will be possible to receive a stolen copyright). However, the change in terminology seems to have only a marginal advantage. "Receiving" is the more common terminology in Australia and MCCOC prefers to retain that term.

The *Theft Act* handling offence is very complex and has led to litigation about the various terms used to describe the way in which the offence may be committed. The offence is in the following terms in the Victorian *Crimes Act*:

> A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods or brings them into Victoria, or dishonestly undertakes or assists in bringing them into Victoria or in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.[69]

Weinberg and Williams have calculated that there are 18 different ways in which the physical elements of the offence may be specified. The offence falls into two branches. First, there is the basic offence of receiving by the defendant on his or her own account. The second branch sets out a multiplicity of ways the defendant can assist *another* person. This can be by storing them for the other person or assisting with their sale by the other person ("undertakes or assists in their retention, removal, disposal or realisation *by or for the benefit of another person*, or if he arranges to do so").

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68 See s22 *Theft Act (UK);* Vic: s88; ACT: s113. For the MCC complicity provisions, see *MCC*: s11.2 Accessory after the fact provisions vary between the jurisdictions. The following version of the offence is currently under consideration by MCCOC.

Where:

(a) a person (in this section called the 'principal offender') has committed an offence; and

(b) another person (in this section called 'accessory'):

(i) knowing or believing the principal offender to have committed the offence; or

(ii) believing the principal offender to have committed another offence, being a related offence;

without lawful excuse or authority, assists the principal offender in order to enable the principal offender to escape apprehension, or prosecution or to obtain, keep or dispose of the proceeds of the offence;

the accessory is guilty of an offence.

69 Vic: s88(2); ACT: s113.

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In all the cases in the second branch, the defendant's conduct is by way of assistance to a principal offender. There is nothing about the offence of receiving that warrants separate complicity rules. It is clearer and more consistent to deal with this through the law of complicity. For example, where the principal is the thief and the defendant helps the thief sell the stolen goods, then the defendant is an accessory after the fact to theft. If the principal is a *receiver* and the defendant helps him or her unload the truck delivering the stolen goods, the defendant is an accessory to receiving. If the defendant becomes involved in helping a receiver sell the stolen goods already stored in the receiver's shed, the defendant is accessory after the fact of receiving. If the principal is a thief who steals goods in Sydney and brings them to the defendant in Melbourne who helps the thief sell them, the defendant in Melbourne is an accessory after the fact to theft.[70]

The *Theft Act* offence includes the proviso that the receiving of the stolen goods must occur, "otherwise than in the course of stealing them". This is because the wide definition of appropriation in the *Theft Act* means that almost any dealing with goods amounts to an appropriation and hence - without the proviso - almost all cases of receiving also amount to theft. If strict logic were applied, it would be possible to argue in virtually every case that the defendant is not guilty of receiving because his or her conduct amounted to theft. It seems that the phrase was intended to refer to the original stealing and whether the defendant was still in the act of stealing. The problem is that the words themselves do not say so. The purpose of the proviso is to avoid the thief being guilty of receiving if he or she keeps the stolen goods; it is a sort of double jeopardy provision. The reverse should also apply: it should not be possible for the receiver to be convicted of theft. This problem is more straightforwardly dealt with by s16.8(5).

Where theft and receiving are charged together, a further difficulty arises when the magistrate or jury is certain that one of the offences has been committed but is not certain which one. In this situation, the High Court has said that the defendant should be convicted of the less serious offence. According to the majority of the High Court this should be determined on the substance of the offences, not the length of the maximum sentence. Under the *MCC*, the sentences for theft and receiving are the same. The Committee believes that the best approach to a difficult problem is that where the jury is satisfied beyond reasonable doubt that the defendant is guilty of theft or receiving but cannot decide which, it should convict of the offence it regards as more probable. Where it cannot choose, it should convict of theft. Section 16.8(6) codifies that approach.[71]

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70 See footnote 68.

71 *Gilson* [1991] 172 CLR 353. See I Leader-Elliott and M Goode, "Larceny or Receiving: Blind Choices and Uncertain Justice" - *An Annual Survey of Australian Law 1991*, Adelaide, 312.

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16.8(2)-(3) - Stolen property

The *Theft Act* handling offence is restricted to goods. The *MCC* follows the *Theft Act,* but uses the term "property" rather than goods to take advantage of the definitions in s14.4. Stolen property is defined to cover all forms of property - tangible and intangible - but not to include land (s16.8(2)).[72]

The prosecution has to prove that the goods are stolen. The definition of "s*tolen* goods" is expanded to include goods obtained by deception (s16.8(2)(a)). The *Theft Act* also includes goods obtained by blackmail. In a number of jurisdictions, the definition goes wider still to include goods obtained in circumstances amounting to an indictable offence.[73] The width of this definition could have been justified to some extent by the multiplicity of dishonesty theft/ fraud offences under the old law and the fine distinctions, for example, between larceny and embezzlement. However, these definitions are extraordinarily wide, potentially wide enough to produce wholly unintended results (for example, the definition seems wide enough to include drug purchases). Receiving stolen goods is a serious offence and the definition of the offence ought to be targeted at a specific evil. That evil is the operation of fences who provide an incentive for theft. Targeting the offence at receiving stolen goods or goods obtained by deception meets that objective. Other conduct can be dealt with by specific offences or accessory after the fact provisions where appropriate.

Where stolen goods have been converted into cash or other goods, s16.8(2)(c) provides that the taint carries through to those proceeds so long as they are the proceeds of the stolen goods in the hands of a thief or a receiver. The limitation to the hands of the thief or a receiver follows the *Theft Act*. The Committee considered the alternative of leaving the goods as stolen goods or their proceeds so long as they were identifiably stolen. However, the *Theft Act* replaced a similar provision which had been much criticised for being too open-ended. Section 16.8 simplifies the very complex equivalent provisions in the *Theft Act*.

Goods cease to be stolen when they are returned to the person from whom they were stolen or to other lawful possession or custody (eg the police have taken possession of them), or the owner has ceased to have any right of restitution with respect to the theft - s16.8(3). This follows the *Theft Act* provision.[74]

To be guilty of receiving at common law, the goods had to be stolen within the jurisdiction. But it should not matter whether the goods received in Hobart, for example, were stolen in Fremantle. Hence the *Theft Act* and all the jurisdictions provide that it does not matter for receiving that the goods have been stolen elsewhere. Take the example of goods stolen in Victoria and taken to SA for sale to a fence. The fence knows these facts. Section 16.8(3) includes

72 See s34(2)(b). Vic: s71; ACT: s113. On this offence the ACT departs markedly from the *Theft Act* model.

73 For example, see Qld: s433 and Qld(New): 165 (4); and SA: s196.

74 Vic: s90(3); ACT: s98(3). See too *Alexander and Keeley* [1981] VR 277.

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goods stolen interstate within the definition of stolen goods. The prosecution has to prove that the stealing would have been stealing in the other jurisdiction.

Some jurisdictions also make it an offence carrying a heavier penalty than theft, to be in *possession* of items stolen in another jurisdiction. Where the defendant happens to be caught in NSW, defining the offence in terms of possession is a device to give jurisdiction to NSW in cases which are effectively theft or receiving cases in another jurisdiction. This allows NSW authorities, for example, to prosecute the defendant - whom they suspect stole or received goods in Victoria - for the possession offence in NSW.[75] It is anomalous that this offence - which does not require proof of the elements of theft - should carry a heavier penalty than theft and be little different in substance from the unlawful possession of stolen goods which is a summary offence. The inconvenience of extradition does not warrant such an anomaly. If the offence is serious enough to warrant prosecution for theft or receiving, the defendant should be extradited. (Failing this, jurisdictions may wish to consider whether they wish to confer jurisdiction on one another to prosecute for theft or receiving, or perhaps for those offences where the value of the goods is less than a certain amount - say $10,000). Otherwise, the summary offence of unlawful possession is the appropriate charge.

16.8(1) - Fault elements

Like the other offences in this chapter, dishonesty is a requirement of the receiving offence. Thus someone who receives goods knowing they are stolen but intending to return them, is not guilty of receiving because such a person is not dishonest.

There are also some issues of complexity with the fault element of receiving. Under existing law, the prosecution has to show that the defendant knew or believed that the goods were stolen. Belief is the alternative to knowledge for this offence. A person may believe the goods to be stolen without knowing that is true. Belief is not a defined fault element in the *MCC* and so it should be given its plain meaning. At most, suspicion might be evidence that the defendant knew or believed that the goods were stolen. Recklessness does not suffice. The Committee believes that approach is correct given the serious nature of this offence and the fact that belief is the alternative to knowledge.[76]

Both these fault elements must be present at the point of receiving. There is an issue about how to deal with a situation where the defendant innocently comes into possession of goods - by buying them or letting them be stored at the defendant's premises - and *subsequently* discovers that goods are stolen. For example, say the defendant's brother is a thief and puts goods in the defendant's garage without the defendant's knowledge. The defendant finds them there

75 See, for example, NSW: s189A(1).

76 Williams and Weinberg, 384-6 and the cases cited there.

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next day and rings his brother up to find out what is going on. The brother admits that he stole them. The defendant angrily tells him to come and get them as soon as possible. The brother agrees. The defendant does nothing in relation to the goods. A day later, the goods are still there, the police arrive and charge the defendant with receiving.

Mere retaining after innocent receipt is not receiving under the *Theft Act* or in the majority of the Australian jurisdictions. This is consistent with the general principle that the physical and fault elements of an offence have to coincide. The exceptions are Tasmania, the Northern Territory and the ACT which expand receiving to include mere *possession* of stolen goods. If the defendant did anything in order to assist his brother to keep the goods or to dispose of them, he might become an accessory after the fact.

Under the *Theft Act* receiving provision, the defendant would be guilty of handling if he assisted the thief retain or dispose of the goods but would not be guilty of receiving if he merely retained them for his own benefit. However, under the *Theft Act*, the defendant would be guilty of theft if he took the goods for his own use. This would not be theft at common law. On the other hand if the defendant had bought the goods in good faith from his brother, he would not be guilty of theft. In the example, the defendant has not committed theft because he has not assumed any of the rights of an owner in relation to the goods.[77]

These rules are complex and anomalous. They should be rationalised consistently with the principle of requiring coincidence of physical and fault elements. The innocent receipt of stolen goods followed by realisation at a later time (T2) that the goods are stolen obviously raises the same sort of problem as the mistake cases where the defendant does not discover the mistake until T2 (see above). In relation to those cases, MCCOC has decided that the T2 mistake cases should not be theft on the basis that imposing positive obligations on people to do things on pain of theft draws the line on the wrong side in a difficult line-drawing exercise. There should be a consistent approach for receiving. Where the defendant innocently receives goods and subsequently discovers they are stolen, he or she should not be placed under an obligation to return the goods or in default commit receiving. Nor should this offence be converted into a possession offence, little different from the offence of unlawful possession save for the fact that under the receiving offence, the prosecution would bear the burden of proving that the defendant knew or believed the goods were stolen. It should be noted that in the examples mentioned, the defendant would be liable for the summary unlawful possession offence. To

77 See Williams and Weinberg ch8, esp 357,364,369, 381-2; Smith 13-36. In some jurisdictions that have misprision, it would probably be that offence but that offence is much criticised for these sorts of cases. The defendant would be guilty of theft if he or she bought the goods because of s3(2) of the UK *Theft Act*; Vic:s73(5); ACT s96(5).

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provide that the defendant be convicted of theft in some of these cases - ie those where he paid for the goods without knowing they were stolen - is also inconsistent. While it is understandable that the defendant will be more reluctant to return goods if he or she has paid for them, the fact that the defendant is given the goods as a present rather than paying for them is not a sufficient basis for a conviction of theft.

In summary, s16.8(1) will continue to require knowledge or belief that the goods were stolen at the time of receipt. Innocent receipt followed by subsequent discovery that the goods are stolen and a decision to keep them will not be receiving. The *Theft Act* extension of the common law which treats some of these cases as theft (ie the innocent recipient of a gift which turns out to be stolen is a thief but the innocent *purchaser* is not) will not be followed (see s15.3(2)). Neither of these cases will be theft. Such people will remain liable as accessories after the fact if they do things to assist the thief in retaining or disposing of the goods and they remain liable for the summary offence of unlawful possession.

Procedure

In general, this part of the Code is not dealing with either evidence or procedure. The general rules of evidence and procedure will apply. However, there are some matters of procedure and evidence that so closely affect the operation of the rules of a particular offence that they justify a special provision. There are a series of special rules of procedure and evidence which have been developed for the purposes of the law of receiving that warrant attention. As will be seen, some of these rules are now outdated; others should be dealt with by the general rules; others should be retained.

The *Theft Act* contains a provision that allows the prosecution to lead evidence that the defendant had been in possession of or handled stolen goods within 12 months of the current charge, or that he or she had been convicted of receiving in the previous 5 years in order to prove that he or she knew the goods in the current charge were stolen. This provision was not included in the Victorian or ACT provisions and should not be included in the *MCC*. This sort of evidence should be dealt with under the general rules applicable to similar fact and propensity evidence.[78]

Both the English and Victorian Acts contain special provisions for search warrants for stolen goods.[79] The origins of these provisions may go back to the time when search warrants were only available for stolen goods. The Victorian Act contains an extremely broad provision (s92(2)) allowing an inspector of police to issue a search warrant if a person in occupation of premises has been convicted of a dishonesty offence in the previous 5 years or such a person has

78 See s27(3) *Theft Act.* See Smith 13-45 and Williams and Weinberg, 387.

79 *Theft Act* s26; Vic: s92.

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occupied premises within the preceding 12 months. The English Act does not contain such a provision. Search warrants are now used for a variety of purposes and search warrants for stolen goods should be dealt with in that context.

The *Theft Act* contains provisions allowing joint trials of several people charged with separate incidents of receiving so long as they relate to the same stolen goods. It also allows one person to be convicted even if the indictment alleges joint handling. These provisions ought to be retained, but be located in the general provisions relating to indictments and alternative verdicts.

Penalty

The remaining substantive difference between theft and receiving is that generally receiving carries a heavier penalty than theft. The rationale for this is that without the "fence", theft is a lot less attractive and the fence may be someone who is more of a "professional". There is a heavier penalty for receiving because it was the original organised crime offence. However, it could equally be said that without the thief there would be no work for the fence and there is no essential difference in culpability between theft and handling. The likelihood is that the great bulk of receiving cases involve people who have bought goods because they were cheap rather than because the people themselves were professional or even amateur fences. The penalty for theft (10 years) allows sufficient range to punish organised receiving of stolen goods. Where the receiver has been involved in a number of cases of handling, multiple counts can be laid which gives the sentencer ample scope to punish according to the true criminality of the conduct. Accordingly, s16.8(1) provides a penalty of 10 years - the same as theft.

Possession of goods reasonably suspected of being stolen

Most jurisdictions have an associated summary offence of being in possession of stolen goods (or goods reasonably suspected of having been stolen) without lawful excuse. The defendant has the burden of proof to satisfy the court that he or she had a lawful excuse, usually that he or she did not know that the goods were stolen. In substance, this offence is very close to receiving but possession (cf receiving) is the nub of the offence and the onus of proving that the possession was innocent is reversed. As noted above, because the offence is based on possession, innocent receipt of stolen goods followed by a subsequent discovery that they were stolen will satisfy the offence.[80]

In all jurisdictions the unlawful possession offence is with minor variations comprised of unlawful possession of property reasonably suspected of being stolen or unlawfully obtained. The prosecution must show that the goods were in the defendant's possession (cf custody in NSW) and that someone had a

80 See footnote 66. But note that the offence of receiving is defined to include possession in ACT, NT and Tas. Note: in SA, it is a defence under the statute if the defendant can prove that he or she came by the property innocently: *Ferrell v Burrows* (1973) SASR 416.

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reasonable suspicion that they were stolen or otherwise unlawfully obtained. There must be something suspicious about the *goods*: it is not enough to show that the defendant personally was a suspicious type. It is then up to the defendant to prove on the balance of probabilities that he or she has a reasonable explanation of the possession.

In DP1, the Committee argued that the reverse onus of proof provision for this offence was inconsistent with principle and led to convictions in cases where the defendant could not provide proof of ownership or innocent possession. Submissions - particularly from police and magistrates - strongly opposed this recommendation on the ground that people who are clearly guilty could avoid conviction if the prosecution had to prove that the defendant knew the goods were stolen. Against the view that very few people in the community could provide proof of innocent possession of a large number of their goods - especially if it turns out that the second hand TV bought was in fact stolen - it was pointed out that the prosecution has to prove first that there are reasonable grounds for suspecting the goods of being stolen.

MCCOC accepts the weight of the submissions and recommends the retention of the summary offence of unlawful possession. Because the offence is so closely linked to receiving, the Committee has included a draft provision although as a summary offence it will not be included in the *MCC* itself.

Unlawful possession of stolen property

X. (1) Any person who:

(a) as any property in his or her possession; or

(b) has any property in the possession of another person; or

(c) has any property in or on any premises, whether belonging to or occupied by the person or not, or whether that property is there for the person's own use or the use of another; or

(d) gives possession of any property to a person who is not lawfully entitled to possession of the property.

which property may be reasonably suspected of being stolen, is guilty of an offence.

Maximum penalty: Imprisonment for 6 months.

(2) In any prosecution for an offence against this section, it is not necessary for the prosecution to prove that the defendant knew or suspected that the property was stolen. However, it is a defence to such a prosecution if the defendant satisfies the court that:

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(a) the defendant had no reasonable grounds for suspecting that the property concerned was stolen; or

(b) the property concerned was not stolen property.

(3) [Code definition of receiving stolen property to be included here.]

(4) If a person is charged with both an offence against this section and an offence of receiving in relation to the same property, proceedings for those offences are not to be heard together.

(5) In this section, **premises** includes any structure, building, vehicle, aircraft, vessel (of any description) or place (whether built on or not).

Drafting note: The following provision is only required in jurisdictions that have laws that prevent a husband or wife from taking proceedings against the other party to the marriage for an offence in relation to property belonging to the husband or wife if the parties were living together at the time (for example, see section 16A of the Married Persons (Property and Torts) Act 1901 (NSW).) The provision could be included in the reevant legislation.

Proceedings for offence may be taken by husband against wife and vice versa

14.6 Despite anything to the contrary in any other Act, proceedings for an offence against this Chapter relating to property belonging, or claimed to belong, to a person who was married at the time of the alleged offence may be taken by the person against the other party to the marriage, whether or not the parties were living together at the time of the alleged offence.

14.6 - Husbands and wives

The *Theft Act* has a special provision about husbands and wives stealing from one another.[81] This appears to be a legacy from the *Married Women's Property Acts* and the *Larceny Act 1916* which had special provisions to allow theft by one spouse from another, but only if they were living apart. Section 30 of the *Theft Act* changed that so that spouses could steal from one another even if they were living together. However, it required the consent of the DPP. In MCCOC's view there is no justification for any restriction on prosecution for theft by one spouse from another.

Section 95 of the Victorian *Crimes Act* contains a declaration that theft applies to spouses in the same way as it does to other people. Such a provision may not be necessary in the *MCC* since, in the absence of anything to the contrary, the provisions of s15.1 would apply to spouses in the same way as it does to other co-owners who steal from another co-owner. However, it may be that the local equivalents of the *Married Women's Property Acts* still operate in some jurisdictions. While the *MCC* will generally repeal the previous criminal law, its application to provisions contained in, say the *Marriage Act*, may be clearer if it is specifically provided that any barrier to proceedings for theft by one spouse from another be removed.

81 Section 30. Vic: s95. See Smith 14-27.

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PART 3.3 FRAUD

The *Theft Act* model contains two basic fraud offences, one relating to physical objects and the other relating to financial advantage.[82]

The most fundamental question here is whether to retain a separate offence for fraud in relation to property or to amalgamate it into the single offence of theft, as has been done in the ACT, where appropriation is defined to include obtaining by deception. If this were to occur, someone who would previously have been charged with a fraud offence would then be charged with theft.

The ACT provision is the response to an issue which has come up in a series of cases under the *Theft Act*. The question was whether the defendant could be convicted of theft where the owner of the goods had consented to the defendant's dealing with them because the defendant deceived the victim. As discussed above in the commentary on s15.3(1), in England the House of Lords decision in *Gomez* held that all cases of obtaining by deception also amounted to theft.[83] Section 15.3 has rejected that approach by defining appropriation to require proof that the owner did not consent. The primary reason for that decision is to maintain the distinction between theft and fraud. The question is whether that decision is justified.

-Arguments for separate theft and fraud offences

The main argument in favour of maintaining two offences is the traditional conceptual separation between takings without the owner's consent and those which occur with the owner's consent, where the consent was obtained by fraud. Although community understanding does not extend to the myriad of fine distinctions made by the common law, the community does make a distinction between theft and fraud: people see stealing and fraud as different kinds of offences. Public comprehensibility has led a number of law reform bodies to reject substituting terms like unlawful homicide for murder. The law should employ terms which communicate the nature of the proscribed conduct unless there are strong reasons to the contrary. Artificially collapsing categories is as bad as artificial distinctions. It undermines public acceptance of the law and confuses juries by lumping disparate forms of behaviour together. To define "appropriations" so as to include deceptions is playing with definitions to no clear advantage. Indeed there may be disadvantages: since "deception" itself still requires separate definition, this will add a layer of complexity to the jury direction on theft in fraud cases. It is much more straightforward to maintain the distinction between theft and fraud. As the Criminal Law Revision Committee put it:

82 See Vic: 81 & 82. See ACT: s96.

83 *Gomez* [1992] WLR 1067. See too *Heddich v Dike* (1981) 3 A Crim R 139.

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> A bogus beggar is regarded as a rogue but not as a thief ... to create a new offence of theft to include conduct which ordinary people would find it difficult to regard as theft would be a mistake.[84]

In any event, even if theft and fraud were collapsed for offences relating to goods, there still needs to be a separate offence for obtaining financial advantage by a deception.[85] It is more consistent to deal with fraud in relation to goods and financial advantages in the same basic way.

The problems that have arisen in cases like *Lawrence* - a taxi driver who deceived his passenger but was charged with theft instead of obtaining by deception - are the result of the prosecution charging the wrong offence: it charged theft when it should have charged obtaining by deception. This should not happen but where it does, it will be possible under the *MCC* to return a conviction of obtaining property by deception. For the reasons outlined in relation to "appropriation", MCCOC believes that appropriation should be defined to mean assumption of the rights of the owner without the owner's consent. Where the defendant is wrongly charged with theft, but the evidence shows that because of the defendant's deception, the victim consented to the defendant taking his or her goods, s17.2(6) will mean that the defendant can be convicted of obtaining by deception. This is preferable to a very wide definition of appropriation in theft which includes all cases of obtaining by deception.

There are also practical advantages to retaining separate offences. Apart from general public understanding, the police who have to make charging decisions are often inexperienced and defining fraud as theft in a complex single provision is likely to be confusing. Given that the proposal to merge the offences carries a requirement that the prosecution provide particulars where deception is relied on, it will also be confusing to have to explain to juries that theft is defined to include fraud. Given that the labels theft and fraud are well understood, that the penalties for the two offences are the same and that the practical problem in cases where the wrong offence is charged is solved by an alternative verdict provision, it would be clearer to retain the separate offence and hard to see what is achieved by merging the two offences.

Arguments against separate theft and fraud offences

A series of cases have been fought in England over the extent of the overlap between theft and obtaining property by deception. The ACT and the Gibbs Committee concluded that merging theft and obtaining property by deception was the most straightforward solution to this problem. Given that the House of Lords has now held that obtaining property by deception can be charged as theft, it makes sense to recognise this merger by dealing with both forms of

84 See CLRC (Theft) p20. As to the need for a definition of deception despite the amalgamation of theft and fraud, see ACT: s93 and Vic: s81(4).

85 See, for example, ACT: s104.

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conduct in the one offence. The ACT does this by defining "appropriation" to include "obtaining by deception". However, unlike the ACT, the Gibbs Committee recommended that, where the prosecution seeks to rely on deception, there be a statutory requirement on the prosecution to particularise the deception.[86]

The suggestion that a conviction for obtaining by deception should be available as an alternative verdict to a charge of theft is not an adequate solution. It exposes the defendant to the risk of conviction for an offence which has not been charged and which may take him or her by surprise. The best way of avoiding such problems is to merge the offences.

Conclusion

In DP1, MCCOC recommended continuation of the separate offences of theft and fraud on the basis of comprehensibility both for the public generally, and for police and juries. The concept of deception has to be retained anyway and it requires some definition. Defining fraud as theft by including deception within the scope of appropriation does not serve the cause of clarity. The case for separate offences is strengthened by the clarification of the definition of appropriation and the inclusion of the alternative verdicts provision. The overwhelming majority of submissions supported that view, including some of those at the ACT consultation who have experience of the amalgamated provision.

86 Gibbs 128-131. The DPP suggested that the offences should be made mutually exclusive by specifying that cases where the victim had consented should be excluded from theft. This follows a suggestion by Glanville Williams. Weinberg and Williams discuss the overlap between the two offences and express uncertainty about whether the alternative verdicts provisions in Victoria cover this situation, 181-191. Section 17.2(6) of the *MCC* makes this explicit. Ultimately, Williams and Weinberg conclude that the offences should be merged, 413.

PART 3.3 - FRAUD

Division 17

Deception - definition

17.1 In this Part, "deception" means any deception, by words or other conduct, as to fact or as to law, including:

(a) a deception as to the intentions of the person using the deception or any other person; or

(b) conduct by a person that causes a computer system or any machine to make a response that the person is not authorised to cause it to do.

Obtaining property by deception

17.2 (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) For the purposes of this section, a person is to be treated as obtaining property if the person obtains ownership, possession or control of it, and obtain includes obtaining for another or enabling oneself or another to obtain or to retain.

(3) A person's obtaining of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.

(4) Section 15.6 applies to this section as if references to appropriating property were references to obtaining property.

(5) A person may be convicted of an offence against this section involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.

(6) A conviction for an offence against this section is an alternative verdict to a charge for the offence of theft and a conviction for the offence of theft is an alternative verdict to a charge for an offence against this section.

17.1 - 17.2 - Obtaining property by deception

Section 17.2 contains the definition for the basic fraud offence.[87] The offence has the following elements:

(1) By any deception

(2) Dishonestly

(3) Obtains

(4) Property

(5) Belonging to another.

(6) Intent to permanently deprive

(1) 17.1 and 17.2 - By any deception

"Deception" is defined in s17.1 to include "any deception by words or other conduct as to fact or as to law, including a deception as to the intentions of the person using the deception or any other person." The definition follows the *Theft Act*. The Victorian and ACT provisions are virtually identical except that the words "(whether deliberate or reckless)" are omitted. This is because under the *MCC*, recklessness automatically applies to any circumstance or result, (s.5-6(2)).

A deception is to induce a person to believe that a thing is true which is false. The person practising the deception must know the thing is false, or know that there is a substantial and unjustifiable risk that it is false. The thing must in fact be false. If the defendant believes the statement is false but it turns out to be true, then there is no deception (ie the fault element for a deception is present but the physical element is not). The thing must be about an existing fact or the law, and includes a deception about the present intention of the defendant (eg that the defendant will pay for the goods on delivery, when the defendant's present intention is not to pay).

The representation can be in the form of words or conduct. Silence by itself is not enough to constitute a deception but it may be if the defendant's conduct can be found by the jury to have constituted a representation. For example, if the defendant orders food in a restaurant but does not intend to pay for it, the defendant can be found to have represented by conduct - because that is the convention in restaurants - that she or he was prepared to pay for the food. In this example, there was a deception about the defendant's present intention which was false. The statutory provision goes on to include deceptions practised on computers and overcomes some suggestion in the case law that deceptions

87 Vic: s.81. Because the ACT includes fraud under its basic theft provision - defining obtaining by deception as a form of appropriation (s96) - the Victorian provision will be used as the basis for discussion here.

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could only be practised on humans. A person who obtained money from an automatic teller machine by dishonestly using someone else's card would be caught by s17.1(b).[88]

The word "by" in the phrase, "by any deception", requires that there be a causal link between the deception and the obtaining. The fact that the defendant practised a deception will not be enough if that deception was not the cause of the obtaining. If the defendant falsely represented he or she was starving in order to obtain food from another person but, unbeknown to the defendant, that person was giving food away to anyone as part of a sales promotion, the defendant's deception would not have been the cause of obtaining the food.

A causation issue arises in cases involving credit cards where the merchant is presented with a credit card by a person not authorised to use it (eg the defendant may have had authority to use the card withdrawn or may have stolen the card). There is an implied representation that the defendant is entitled to use the card but this does not matter to the merchant because the rules for accepting credit cards do not require the merchant to be satisfied that the defendant is entitled to use the card. It has been argued that the deception about entitlement does not *cause* the merchant to hand over the goods because it is irrelevant to the merchant: he or she gets paid by the credit card company whether the defendant is entitled to use the card or not. The counter-argument is that the deception is causal because the merchant would not have handed over the goods if he or she knew the true position. This argument was accepted by the House of Lords in *Charles*, although it is a question of fact in any given case. In *Lambie*, similarly, the defendant was convicted of obtaining a financial advantage from the credit card company by her deception on the merchant.[89] Most merchants probably would say that they would not accept a card if they knew the defendant was not entitled to use it. But the argument would be vulnerable if the merchant said that he or he would have taken the card anyway because he or she would still be paid by the credit card company. If the merchant in fact knew that the defendant was not authorised to use the credit card, this would

88 See Smith, ch 4. The classic definition of deception is from *In re London and Globe Finance Ltd* [1903] 1 Ch 728, 732. On representation by conduct, see: *DPP v Ray* [1974] AC 370. On deception of computers to obtain money or property, etc, see *Kennison v Daire* (1986) 64 ALR 17. For the legislative response, see Vic: s81(4). For the ACT provision on dishonest use of computers, see s135L. The Victorian approach of dealing with this as a form of fraud seems preferable. NSW has followed the Victorian approach on computers: s178BA. The section adopts the *Theft Act* model in the context of comon law fraud offences. The section is identical to the Victorian s82 except that it applies to "any money or valuable thing or financial advantage of any kind whatsoever" rather than "financial advantage". Under the Victorian provisions, obtaining money would probably be treated as a case of obtaining property and prosecuted under s81 where it would be necessary to prove intention to permanently deprive. See the discussion of obtaining financial advantage by deception, below.

89 *Charles* [1977] AC 177; *Lambie* [1982] AC 449. The cases are criticised by Smith, 4-05 - 4-08. See too *Clarkson* [1987] VR 962, 980.

Dishonesty

14.2 (1) In the Chapter, "dishonest" means dishonest according to the standaeds or ordinary people and known by the defendant to be dishonest according to the standards of ordinary poeple.

(2) In a prosection for an offence, dishonesty is a matter for the trier of fact.

Note: Section 15.2 affects the meaning of dishonesty in offencs related to theft and section 17.2(3) affects the meaning of dishonesty in the offences of obtaining property or a financial afvantage by deception. See also section 9.5 (Claim of right).

probably amount to a conspiracy between the customer and the merchant to defraud the credit card company.

(2) 14.2 - Dishonestly

The general definition of dishonesty in s14.2 applies to ss17.2 and 17.3. So, even where there has been a deception, the prosecution will still have to show that the defendant has been dishonest. This follows the common law position where it was necessary to prove "intent to defraud" - interpreted to mean dishonestly in this context - in addition to the deception.[90]

In most cases the deception itself will speak eloquently of dishonesty. But there may also be cases where there is a deception but the obtaining should not be regarded as dishonest. The claim of right defence is one example: for example, an owner who uses a deception to regain property which he or she believes is being held unlawfully by a person who is refusing to return it. Another example might be a person who hands over a cheque, saying that the funds are in the bank but knowing that they are not currently there but that they will be by the time the cheque is presented. Such a person practises a deception but may not be dishonest. In some ways, such a person is analogous to the defendant in *Feely*. There may be other examples. A daughter may deceive her elderly mother into transferring property into her name (eg antique furniture which the mother refuses to sell) by telling her "white lies" so as to sell it in order to pay for her mother's care. The daughter's motive is to spare emotional trauma and genuinely for the mother's benefit. A very difficult example arises in commercial transactions - eg raising a loan to get a sound company through a cash flow crisis - and may involve deceptions about the company's present position which, if it were known, would cause the loan to be refused and certainly sink an otherwise sound company. The motive is to save thousands of small investors from losing their money. Similarly again, the defendant may practise a deception on a mentally ill person in order to take away a gun owned by the mentally ill person. The purpose of the examples is not to say that these people ought to be convicted or acquitted. But they are intended to point out the existence of difficult borderline cases and the difficulty of predicting the shapes and forms those cases may take. The presence of the element of dishonesty allows a jury to determine the issue according to the standards of ordinary people.[91]

Under the *Theft Act*, there is a question about the applicability of the special qualifications on dishonesty for the offence of theft.[92] For example, claim of right is specifically mentioned as rebutting dishonesty for the purposes of theft but it is not mentioned in relation to the deception offences. This problem

90 Smith, 4-29. See too, for example, NSW: s179.

91 *Greenstein* [1976] 1 All E R 1 and Smith, 4-29 - 4-35.

92 See s73(2) *Crimes Act* 1958 (Vic). The decisions in the *Bonollo* [1981] VR 633 line of cases (see footnote 18) seem to assume that the qualifications of dishonesty in relation to theft also apply to fraud.

Property

14.4 In this Chapter

"property" includes all real or personal property, including:

(a) money; and

(b) things in action or other intangible property; and

(c) electricity; and

(d) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of person;

does not arise under the *MCC* provisions because s14.2 defines dishonesty generally for the chapter and the claim of right defence is contained in s9.5 of the *MCC*. The general definition of dishonesty means that it is no longer necessary to provide - either for theft or for deception - that belief by the defendant that the victim would have consented if he or she had known the true circumstances is not dishonest. The remaining qualification on dishonesty for theft relates to the finding cases and has no application to fraud. In the case of both theft and fraud, the fact that the defendant is prepared to pay for the goods does not necessarily absolve him or her of dishonesty (ss15.2(2), and 17.2(3)).

(3) 17.2 - Obtains

The meaning of obtaining is wider than the definition of appropriation adopted in s.15.3 in that it does not involve any absence of consent. The deception causes the defendant to consent to the transfer. This offence is wider than the common law offence of obtaining by false pretences which only applied to obtaining *ownership*. Section 17.2(2) applies to obtaining ownership, possession or control of property. It includes obtaining for another or enabling another to obtain or retain. So where the defendant deceives the victim into giving goods to another person, the defendant is guilty.[93]

(4) 14.4 - Property

The general definition of property contained in s.14.4 applies to 17.2. It includes land, money, things in action and other intangible property. The definition of property is wider than for theft. Land cannot be stolen but can be obtained by deception.[94] As noted above, this is another reason for maintaining a separate fraud offence.

(5) 14.5 - Belonging to another

Property will be regarded as belonging to a person who has ownership possession or control of it by virtue of the general definition in s14.5.

(6)15.6 and 17.2(4) - Intention to permanently deprive

Intention to permanently deprive is an element for this offence as it is for theft. A clear majority of submissions favoured retention of this element, as they did for theft.

The extended meanings of intent to permanently deprive set out in s.15.6 are applied to this offence by s.17.2(4). The requirement is met if the defendant intends to treat the property as his or her own to deal with, or keeps it in circumstances equivalent to a permanent deprivation, or parts with it on conditions he or she may not be able to comply with. An intention to return

93 Vic: s81(2). Smith, 4-36 - 4-44.
94 Smith, 4-45 - 4-52.

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the equivalent quantity of a fungible (an interchangeable commodity) would mean that the intention to permanently deprive criterion was met but the defendant would be able to argue that he or she was not dishonest.

Penalty

The maximum penalty for obtaining property by deception is the same as for theft, 10 years.

Obtaining financial advantage by deception

17.3 A person who by any deception dishonestly obtains for himself, herself or another any financial advantage is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

17.3 - Obtaining a financial advantage by deception

Section 17.3 contains the second basic fraud offence under the *Theft Act* used to deal with frauds involving intangible financial benefits rather than property.[95] The offence has the following elements:

(1) By any deception

(2) dishonestly

(3) obtains for himself or another

(4) any financial advantage

(1) By any deception

This element is the same as for the s17.1 and 17.2 offences.

(2) Dishonestly

This element follows the general definition.

(3) Obtains

The extended definition of obtains - to include ownership, possession and control - used in s17.2 is not necessary for s17.3 because of the abstract nature of financial advantage.

(4) Financial advantage

Section 17.3 follows the Victorian Act in using the term "financial advantage" which is not defined. The English Act used the term "pecuniary advantage" and went on to define it. These definitions led to criticism of the English provision as "a judicial nightmare". The ACT uses the term financial advantage but then restricts it to things like obtaining an overdraft or an increase in remuneration. It then goes on in succeeding sections to create separate offences for obtaining a service and evading a liability, along the lines of the English legislation.[96] The Victorian provision covers at least the same conduct as the English approach but has not led to the same difficulties or the same possible gaps of coverage (eg in England the obtaining of some sorts of loans by deception are covered but others are not). How far the concept of a financial advantage extends is open to question but what is obtained must be characterisable somehow as an advantage in money terms. Obtaining an honorary position, for example, would not be included. Clearly this provision does not go as far as provisions in WA and Queensland which extend to dishonestly obtaining any benefit or causing any detriment, financial or otherwise, and to getting a person to do or refrain from doing any lawful act. The ambit of these offences is extremely wide extending to damage to reputation, avoidance of school or work

95 Vic: s82

96 Vic: s82; ACT: s104 - 106.

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discipline, obtaining business, sexual or other personal favours, and so on. MCCOC has decided that the offences in this chapter should be restricted to offences against property and that other forms of benefit or detriment should be considered, if at all, in the context of specific offences (eg sex offences).[97]

The scope of the concept "financial advantage" arose in a Victorian case. the question was whether a penniless person wrote a valueless cheque would gain a financial advantage since the person would not be able to pay the debt, either at the time of writing the cheque or later when it became known that the cheque was valueless. Hence, it was argued, there would be no advantage. In the case, the actual victim continued to work for the defendant for a further 4 weeks after the cheque was written. The court held that either the evasion of the debt at the time the cheque was written or the additional 4 weeks work were capable of constituting a financial advantage. It held that the terms "financial" and "advantage" were ordinary words, that the concept of a "financial advantage" was a simple one, and that the Parliament had been wise not to define it. The evasion of a debt for however short a time even by someone who is penniless was held to be a financial advantage. The evasion of the debt amounts to a form of credit or time to pay. The fact that the defendant is unable to pay is irrelevant.[98]

Although financial advantage is broad enough to encompass virtually all cases of obtaining property by deception, the practice in Victoria, supported by the principal text for prosecutors, appears to be to confine s17.3 to cases which do not involve obtaining property (eg credit, services, etc). This approach conforms with the structure of the legislation.[99]

Most submissions favoured the "financial advantage" approach. Some submissions favoured the term "benefit" and the NSW Magistrates suggested "money or financial benefit" as in s178BA of the NSW *Crimes Act*. However, money is covered already by s17.2 and ought to be prosecuted under that section and there does not appear to be much to choose between the words "advantage" and "benefit". Three submissions thought that "financial advantage" was too broad. One submission thought it should be broader and extend to any benefit. MCCOC has concluded that the general approach of the Victorian legislation is preferable to the approach adopted in England and the ACT, and not so general as to offend the principle of certainty.

Section 17.3 does not have intent to permanently deprive as an element. It is enough that the financial advantage is temporary. The abstract nature of a financial advantage does not easily lend itself to permanence: the advantage

97 See ACT: s104-6; WA: s409; Qld (New): s184 (and the definitions of benefit and detriment in s176-9. It would appear that these definitions could include damage.)

98 See *Mattthews v Fountain* [1982] VR 1045, 1049-50. See the discussion in Williams and Weinberg, 174-181, 190-1 & 414.

99 Heath, *Indictable Offences in Victoria* 1992, 256.

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once gained may lead to gains in money or property which may only require that the financial advantage was gained temporarily. Nor is financial advantage something that could previously be said to have belonged to another.

Penalty

The maximum penalty for this offence is 10 years, the same as for theft and obtaining property by deception. The Victorian Act used to provide a lower penalty for this offence but this was changed following a comprehensive review of maximum sentences. The ACT still has a lower penalty. MCCOC has concluded that the level of culpability involved in obtaining financial advantage by deception is the same as obtaining property by deception and that the maximum sentence should be the same.[100]

100 R Fox and A Freiberg, *Review of Statutory Maximum Penalties: Report to the Attorney-General,* Melbourne, 1989 and item 40 of Schedule 2 of the *Sentencing Act 1991 (Vic).*

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A general dishonesty offence?

Despite the flexibility of the *Theft Act* provisions on theft and fraud, some still argue the need for a general dishonesty offence to cover cases which fall outside the ambit of the offences of theft, obtain property by deception, and obtain a financial advantage by deception. A recent Report by the English Law Commission on the offence of conspiracy to defraud has foreshadowed this possibility in view of what it saw as some gaps in the *Theft Act* model.[101] Most of those gaps are in fact closed by amendments to the *Theft Act* model recommended in this Report (eg deception of computers, obtaining loans by deception). The offence of conspiracy to defraud covers some others but that offence exists independently of the *Theft Act*. Conspiracy to defraud is to be the subject of a separate MCCOC discussion paper to be issued shortly and accordingly no recommendation regarding that offence is made in this Report. Nevertheless, the question arises as to whether conduct currently covered by conspiracy to defraud if committed by two or more should be criminalised if committed by an individual. The most obvious case of such conduct is dishonest conduct where there has been no deception. Sometimes such an offence is referred to as a general fraud offence but this is misleading. Fraud implies deception but the point of the offence is to cover cases where there is no deception but there is dishonesty. Hence it is clearer to refer to it as a general dishonesty offence.

The most obvious examples of cases which might be caught by a general dishonesty offence are cases where there is some form of dishonest acquisition of property but the conduct does not involve theft or fraud (eg the employee who uses the employer's premises to make a secret profit, the cinema projectionist who secretly makes copies of films and sells the copies). These cases are not theft because they do not involve an appropriation, or there is no intent to permanently deprive. Nor are they either of the deception offences (ss 17.2 and 17.3) because there was no deception. An agreement to do these sorts of things has been held to be a conspiracy to defraud, notwithstanding that the conduct if done by an individual would not amount to either theft or fraud.[102] The creation of a general dishonesty offence along the lines of conspiracy to defraud offence - but without the need to prove an agreement - would mean that a person like some of the Ds in the conspiracy to defraud cases could be convicted of an offence of general dishonesty even if they were the sole participant in the scheme. Such an offence could take the form of the existing deception offences but simply drop the requirement that there be a deception. The offence would then be as follows:

101 Law Com 228

102 *Scott v Metropolitan Police Commissioner* [1975] AC 819*; Cooke* [1986] AC 909.

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(1) A person who dishonestly obtains property belonging to another, with the intention of depriving the other permanently of it, is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) A person who dishonestly obtains a financial advantage is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

The creation of such an offence would obviate the need to retain a separate offence of conspiracy to defraud because the concerns which led to its codification - the existence of cases which involve dishonest gains or losses but do not fit within any of the existing theft/fraud offences - would have disappeared. Such cases could simply be charged as conspiracies to commit the general dishonesty offence. However the ramifications of such an offence extend far beyond the offence of conspiracy. A general dishonesty offence would make most of the offences in this chapter superfluous. So long as the prosecution could prove a dishonest obtaining of property or a financial advantage, the offence would be proved without the need to prove any of the other elements - such as appropriation without consent, property belonging to another, intention to permanently deprive, deception, use of menaces, the intent to influence the exercise of an agent's duty - of the existing offences. Guilt or innocence in these cases would turn almost solely on the element of dishonesty.

General offences of this sort have not existed anywhere in the common law world until recent years. However, there are now three different examples of a general dishonesty offence: s29D of the *Crimes Act(Cth)*, s409 of the *Criminal Code Act (WA)*, and s380 of the *Criminal Code (Canada)*. MCCOC has carefully considered whether such an offence should be included in the *MCC*.

Section 29D of the *Crimes Act (Cth)* is as follows:

> A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence.
>
> Penalty: 1000 penalty units or imprisonment for 10 years, or both.

There is no appellate interpretation of this provision but the relevance of the conspiracy to defraud cases is patent. Effectively, this offence is conspiracy to defraud without the need for a conspiracy: the wording of s29D follows the conspiracy to defraud provision (s86A) of the *Crimes Act (Cth)* which is itself a codification of common law conspiracy to defraud. Thus, it is to be expected that the provision will be interpreted to mean that a person who dishonestly causes an economic loss to the Commonwealth or influences the exercise of a public duty will be guilty of the offence. If the recent Privy Council decision in *Wai Yu-tsang* is followed it may extend to inducing the Commonwealth or a Commonwealth agency to do any act to its detriment. Dishonesty will be

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measured by the *Feely/Ghosh* test and it will not be necessary to prove a deception.[103]

Like s29D, section 409 of the *Criminal Code Act (WA)* does not require a deception but it is a much broader and more complex provision than s29D. It was introduced in 1990 and is as follows:

> (1) Any person who, with intent to defraud, by deceit or any fraudulent means -
>
> (a) obtains property from any person;
>
> (b) induces any person to deliver property to another person;
>
> (c) gains a benefit, pecuniary or otherwise for any person;
>
> (d) causes a detriment, pecuniary or otherwise to any person;
>
> (e) induces any person to do any act that the person is lawfully entitled to abstain from doing;
>
> (f) induces any person abstain from doing any act that the person is lawfully entitled to do,
>
> is guilty of a crime and is liable to imprisonment for 7 years.
>
> Summary conviction penalty (subject to subsection (2)): Imprisonment for 2 years or a fine of $8000.
>
> (2) If the value of -
>
> (a) the property obtained or delivered; or
>
> (b) a benefit gained or a detriment caused;
>
> is more than $4000 the charge is not to be dealt with summarily.
>
> (3) It is immaterial that the accused person intended to give value for the property obtained or delivered, or the benefit gained, or the detriment caused.

The Western Australian offence requires proof of intent to defraud which is likely to be interpreted to mean dishonesty on the *Feely/Ghosh* test[104] Although the offence can be committed by a deception ("deceit"), deception is *not* a necessary requirement: "any fraudulent means will suffice". Presumably - because

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103 On Cth: s86A and WA: s29D, see Lanham et al. A limited form of this offence appears in NSW: s176A. It is limited to company directors, officers or members and dealings with the company. It is subject to the same criticisms as s29D and to the criticism that it discriminates against company directors, officers and members. *Wai-Yu-tsang* [1991] 1 AC 269 (Privy Council).

104 WA: s409. The common law interpretation of intent to defraud as dishonesty plus intent to cause loss or influence the exercise of a public duty is apparently displaced in this section by dishonesty plus the list of matters which may be obtained, etc. On dishonesty in the context of conspiracy to defraud, see the commentary on s14.2 - dishonesty above, esp footnote 23.

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of the conspiracy to defraud cases and the juxtaposition of "deceit" and "fraudulent means" in the section - this means any "dishonest" means of obtaining will suffice, a seeming duplication of the fault element "intent to defraud". Finally, the offence is not limited to economic gain or loss but extends to obtaining *any* benefit pecuniary or otherwise, and getting any person (not just a public official) to do or not to do any lawful act.

The Canadian offence is also based on "deceit, falsehood or other fraudulent means..." and does not necessarily require deception. In *Zlatic*, the defendant ran a clothing business. He had a lot of goods on credit from suppliers. He sold clothes to customers and used the proceeds for gambling. When he lost this money, he was charged with the general dishonesty offence in relation to the creditors. The court held that fraudulent means dishonest which is defined by a reasonable person test: what a reasonable, decent person would consider dishonest and unscrupulous. The conviction was upheld 3:2 by the Supreme Court. This appears to make non-payment of debts without any deception on the defendant's part into a serious criminal offence, so long as the conduct can be said to be dishonest. This is a considerable extension of the existing law.[105]

The question is whether a general dishonesty offence along the lines of these offences should be included in the *MCC*.

-Arguments for

The conspiracy to defraud cases show that there can be significant offences of dishonesty which can only be prosecuted if committed pursuant to a conspiracy. Primarily, they are cases where nothing in the nature of a deception can be shown but there is clear dishonesty. Examples of such cases are *Scott* (illegal copying of films), *Hollinshead* (manufacture of electricity meter devices) and *Combe* (using employer's premises to make profits).[106] Similarly, ongoing payment schemes - such as social security - can be defrauded without any deception where the recipient fails to inform the authority of a change in circumstance which means that the pension or benefit is no longer payable.

105 *Zlatic* (1993) 79 CCC (3d) 466. See too *R v Olan, Hudson and Hartnett* (1978) 41 CCC (2d) 145. Section 308(1) of the Canadian Code defines the offence as follows:

380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding 10 years, where the subject matter of the offence is a testamentary instrument of where the value of the offence exceeds one thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(i) of an offence punishable on summary conviction.

where the value of the subject matter of the offence does not exceed one thousand dollars.

106 *Scott v Metropolitan Police Commissioner* [1975] AC 819, *Hollinshead* [1985] AC 975; *Cooke* [1986] 1 AC 909.

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The most dramatic example of the need for a general dishonesty provision occurred in what were known as "bottom of the harbour" taxation schemes. These schemes involved defendants buying a profitable company with a large tax liability and, through a series of transactions, taking the cash out of the company, leaving it with the tax liability but in the hands of people with no assets. None of these transactions involved a deception. Although these schemes have now been made specifically illegal under the *Crimes (Taxation Offences) Act 1980 (Cth)* they demonstrate the ingenuity of dishonest people and the massive mounts of money that can be misappropriated by people who can put themselves outside the ambit of the existing dishonesty offences.

The absence of a general dishonesty offence will also make it more difficult to regulate cases where benefits are obtained which do not amount to money or property or a financial advantage. For example, a person may obtain a visa to enter the country by deception.

There are also procedural and sentencing disadvantages in having to rely on conspiracy counts in the serious cases. Commonwealth Special Prosecutor, Roger Gyles QC, pointed out these difficulties in his 1982/3 Report to Parliament. The result of this was the enactment of s29D of the *Crimes Act (Cth)* in 1984. The ongoing importance of procedural issues should not be overlooked at a time when the length and complexity of serious fraud cases is of serious concern.

Nor should the other advantages of the s29D offence be overlooked. The Commonwealth DPP laid charges under 29D in 70 cases in 1993/4. Although the majority of these cases did involve a deception, the practical advantage of this charge over other available charges is an important factor. The problem in a case of dishonesty not involving deception, is that the prosecution will be forced to use either a charge of conspiracy to defraud (assuming conspiracy can be established) or charge under specific legislation. Existing specific legislation - with few exceptions such as the *Crimes (Taxation Offences) Act* is not designed for serious fraud offences; the *Crimes (Taxation Offences) Act* only deals with one particular form of fraud on the revenue (asset stripping). As one example of specific legislation, s1350 of the *Social Security Act 1991* provides, inter alia, for an offence of knowingly obtaining a pension by means of a fraudulent device but the penalty is limited to 12 months imprisonment. To enact a series of provisions dealing with frauds on the various organisations of Government with adequate penalties would be major legislative exercise. With the possible exception of s.1350 of the *Social Security Act*, it would not be sufficient to merely increase the penalties under existing provisions. The provisions would need to be re-written to justify the substantial increase in penalty. Nor would it be sufficient to limit the exercise to amendment of existing Acts as many of the activities of Government are not provided for by legislation.

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It has been suggested that the cure to these problems is to enact specific offences to deal with them rather than a general dishonesty offence. However there are very significant difficulties with this approach. The ingenuity of fraudsters is such that the statute book has little or no chance of keeping up to them. The specific offence is usually never devised until it is all too late. Some dishonest people will never be charged or will be acquitted before the gap is closed. There will be a plethora of offences - the opposite to what we are hoping to achieve under the Model Criminal Code.

The strength of the case for a general dishonesty offence found favour in the Murray Report in Western Australia and, following the Murray approach, the O'Regan Review in Queensland. The Gibbs Committee favoured the retention of s29D of the *Crimes Act(Cth)*. However, the new Queensland Code (s184) retains the requirement to prove a deception. The English Law Commission canvassed the arguments for and against such an offence in its 1984 Working Paper 104 but in its 1994 Report decided to retain conspiracy to defraud pending a general review of its dishonesty offences.

-Arguments against

Both the Commonwealth and the Western Australian provisions have been criticised in the strongest terms. For example, Lanham, Weinberg, Brown and Ryan describe s29D in the following terms:

> A new and extraordinarily vague offence of fraud is contained in s29D which was inserted into the *Crimes Act* in 1984. It is to be hoped that this draconic provision will not be widely used in the future, though it may be preferable to the vagaries of the offence of conspiracy to defraud the Commonwealth under s86. There is no case law yet in existence to elucidate the meaning of the word "defrauds" in s29D. Presumably, it will be construed as requiring deception on the part of the defendant designed to induce a particular course of action which would not otherwise be undertaken. Just how much more will be required is a matter of speculation.[107]

The speculation is that in fact *less* will be required: if *Scott* continues to be followed in Australia, it will not be necessary to prove deception. Similarly, s409 of the *Criminal Code Act (WA)* has been criticised as "vague, sweeping and arbitrary".[108] The author quotes criticisms of a similar but narrower provision proposed by the English Criminal Law Revision Committee as part of the *Theft Act* 1968 but rejected by the British Parliament.

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107 Lanham et al: 86 and 383. As noted above, on the basis of *Scott* and the Australian cases following it, there seems to be little reason to believe that deception is required as part of this offence.

108 Syrota, "Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence" (1994) 24 *Western Australian Law Review* 261.

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> It places far too much discretion in the hands of prosecuting authorities. It could contribute to racial and other discrimination. It could be a potent weapon of blackmail in the hands of unscrupulous employers. One of the most striking objections to [clause 15(3)] is just that it is "unlegal". It is a pity that the [majority of the Criminal Law Revision Committee] ... should in this case have neglected one of the most important of legal virtues; a chronic dislike of vague, sweeping and arbitrary offences.

But the rejected clause 15(3) was significantly narrower than s409. It still required a deception and an intention to gain or cause loss in money or property. As Syrota points out, simply driving off, hiding when the debt collector comes to call and not paying at a parking meter and "sneaking" into a picture theatre become indictable offences under s409 because there is no need for any deception. Similarly the school student who tells the principal that the train was late in order to avoid detention, the woman who tells a man that she loves him in order to get him to have sex with her and the former unionist who is elected president of the Chamber of Commerce after telling members that he has never had anything to do with unions all commit an offence under s409 which extends to non-pecuniary benefits and inducing people to do things they would otherwise not do. The breadth of s409 seems to make any form of dishonesty which leads to any benefit or action by another person (subject to lawfulness) an indictable offence. Its implications for business transactions that might in any way be construed as dishonest are uncertain. However, it would seem that many actions that currently contravene the misleading and deceptive practices provisions (s52) of the *Trade Practices Act* 1974 would fall foul of a general dishonesty offence.

The impact of such a broad offence on a range of practices not currently thought to be criminal also needs to be considered carefully. No doubt there will always be cases which - in hindsight - most people would wish to see as criminal which will elude the existing criminal offences if they continue to be drawn with any precision. On the other hand, vague, sprawling offences sweep up cases that most people would not consider to be criminal. (There are also cases at the margin which should either be clearly criminal or clearly not criminal.) For example, a group of courier companies make a secret arrangement in breach of the *Trade Practices Act* not to undercut each other's fees with each other's customers. They all benefit from the higher charges they are able to sustain. Is this a dishonest infliction of a detriment on the customers in breach of the general dishonesty offence? The width of the current conspiracy to defraud offence would probably catch such a case although the common perception may well be that although this is properly a breach of prohibitions on anti-competitive practices under the *Trade Practices Act*, it would be going too far to make this an indictable offence. As Williams and Weinberg say in the context of an offence containing both the elements of dishonesty and deception, "The

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line distinguishing sharp business practices from unlawful conduct is at best a fine one."[109]

One of the strengths of the existing law is its requirement that there be proof of a number of discrete elements making up the overall offence of theft or fraud. The criticism of the English approach to the concept of appropriation is that it has virtually deprived that concept of any work to do in distinguishing theft from legitimate transactions and that it makes the whole offence turn on the concept of dishonesty.[110] Removing deception from the fraud offences does the same thing. It makes guilt or innocence turn solely on the concept of dishonesty.

While the concept of dishonesty *in conjunction with* the other more objective elements of these offences has much to recommend it, to make dishonesty the sole criterion would offend the rule of law principle that criminal offence should be certain and knowable in advance. Those who criticise the dishonesty test even in the context of offences which have other more objective elements would be even more critical of an offence based almost solely on the element of dishonesty.

No doubt there is a strong concern to weed out dishonest practices in business and elsewhere, but to turn every shady business practice into theft or fraud runs the risk of over-criminalisation and selective prosecutions. Not every case of dishonesty does amount to theft or fraud. Apart from theft and fraud, there are a number of offences in legislation such as the *Corporations Law* and the *Trade Practices Act* making specific forms of dishonest or misleading conduct an offence. The price of this specificity is that occasionally innovative forms of dishonest conduct will elude the scope of the existing offences. In the Committee's view, this price is worth paying in order to stay within the important rule of law that criminal offences should be certain and knowable in advance. The *Theft Act* offences are already expressed in a more general or abstract way than the preceding law. To take the further step of dispensing with the need to prove an appropriation without consent or that there was a deception is to go too far.[111]

Problems in specific areas like tax and social security can and have been dealt with under specific legislative provisions. The bottom of the harbour cases have been dealt with by specific tax legislation, non-declaration of changes in social security status are dealt by specific offences in social security legislation, as are false declarations in relation to obtaining visas and the like. These cases

109 Williams and Weinberg, 169.

110 See generally Smith's discussion of the *Gomez* decision, ch2.

111 The House of Lords has said something similar in the context of a conspiracy to defraud case: "the making of a secret profit is no criminal offence, whatever other epithet may be appropriate." *Tarling v Singapore Republic Government* (1979) Crim App Rep 77. If there is a need for such an offence, that can be specifically provided for as it is in relation to secret commissions or specifically in the *Corporations Law.*

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need individual consideration and although that may impose a legislative burden, this is better than creating sweeping new offences which draw in a vast amount of conduct which is not justifiably categorised as criminal. In response to enquiries about the need for a general dishonesty offence to combat bottom of the harbour tax cases, the former Royal Commissioner, Mr Frank Costigan QC, said that he did not believe such offences are necessary and that they are contrary to the principle that criminal offences should be specific and knowable in advance. Reports by the Special Prosecutor established as a result of the Costigan and Stewart Royal Commissions, Mr Robert Redlich QC make no mention of the need for a general dishonesty offence, although they do make a series of law reform proposals and review a large number of prosecutions instituted under various Acts as a result of the Royal Commissions.[112]

Conclusion

Ultimately, the criticism of a general dishonesty offence is that it has all the vices of the old law of conspiracy - vices to some extent ameliorated in that offence by the requirement that there be an agreement. MCCOC has considered the arguments for and against a general dishonesty offence and has concluded that such an offence should not be included in the *MCC*.

Although the Committee believes that generally fraud offences in the Model Criminal Code should be no broader than proposed in this report, it recognises that in this area of the criminal law, there are special problems (which may be peculiar to a particular jurisdiction) that may justify the creation of special offences of a general nature. However, consistently with its decision to limit the scope of offences of dishonesty within the *MCC*, the Committee believes that where the creation of a special offence can be justified, its application should be no wider than is necessary to address the particular problem identified and it ought to be restricted to a specific subject matter or a particular class of conduct. Of course any such offence should otherwise accord with the general principles contained in the Code.

> Recommendation
>
> The MCC should not contain a general dishonesty offence.

112 *Annual Report of the Secial Prosecutor* 1982-3, and 1983-4.

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Organised fraud

Some have argued that an organised fraud offence is necessary to reflect the distinction between, for example, the car thief who is a once-off social danger and the professional car theft ring, or the common shop lifter and the gang that does it on a continual and organised basis. Such offences have existed for some time in the United States under the Racketeer Influenced and Corrupt Organisations (RICO) and Continuing Criminal Enterprise (CCE - dealing with drugs) statutes. Organised fraud is an offence under Commonwealth law by section 83 of the *Proceeds of Crime Act* 1987. The offence was designed to attack organised crime and came into being after various Royal Commissions and inquiries into organised frauds - for example, the bottom-of-the-harbour tax fraud - had delivered their reports. The substance of the offence is that a person may be convicted of organised fraud if he or she engages in 3 or more public frauds and derives substantial benefits.[113] The relevant part of the offence is as follows:

> A person shall be taken to engage in organised fraud if, and only if, he or she engages, after the commencement of this Act, in acts or omissions:
>
> (a) that constitute three or more public fraud offences; and
>
> (b) from which the person derives substantial benefit.

No attempt was made to define the expression "substantial benefit": the monetary amount of the fraud was not to be the determinant of guilt but it was to be "considered together with the degree of planning, organisation and persistent unlawful conduct in assessing culpability." The second reading speech introducing the legislation said that it was *not* modelled on the American precedents which have as central concepts "sophisticated methods, organisation and planning and specific monetary limits". These terms are not included in the Commonwealth legislation. As it was put in the second reading speech, " . . . [s]ome of the most effective fraudulent activity has resulted from schemes of utmost simplicity."[114]

If the jury does not find the organised fraud offence proved, it may return an alternative verdict in relation to the public fraud offences. The maximum penalty for the offence is 25 years or a $250,000 fine or both in the case of a natural person and a fine of $750,000 in the case of a corporation. The offence was located in the *Proceeds of Crime Act* because a principal purpose of the provision was to activate its forfeiture provisions.

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113 Public fraud is defined as an offence against Cth: s.29D and s.86A and sections 5,6,7 and 8 of the *Crimes (Taxation Offences) Act 1980* (which relate to sales tax evasion).

114 *Commonwealth Hansard (Reps)* 30/4/87, p2317 The ACT has a provision which follows the Commonwealth model, s76 *Proceeds of Crime Act* 1991 (ACT).

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The Commonwealth DPP advises that this offence has been used infrequently. The DPP has developed guidelines for charging the offence in cases where:

(i) it is considered appropriate to invoke s.30 of the *Proceeds of Crime Act* 1988 (ie the automatic forfeiture provision);

(ii) it appears that the alleged offender was party to a standing arrangement to commit individual frauds (whether or not the defendant acted alone); or

(iii) it appears that the alleged offender was party to a standing arrangement to conceal the proceeds of individual frauds (whether or not the defendant acted alone).

These situations are not to be considered exhaustive of the possible situations where it will be appropriate to charge under s.83.

Aside from s83, its ACT equivalent and the American precedents, other jurisdictions have not enacted organised fraud offences. In the United Kingdom, for example, the approach has been to deal with serious fraud through the establishment of the Serious Fraud Office and procedural reforms for the prosecution of such offences.[115] The question is whether the Model Criminal Code should contain an organised fraud offence.

Arguments for

The offence of organised fraud is designed to reflect the higher level of criminality involved in the organisation of a series of frauds. The purpose of having a special offence is primarily to provide heavier penalties. The problems associated with organised fraud are such that there is a community and political expectation that those involved will definitely be the subject of harsher penalties.

These problems should not be dealt with merely as a matter for sentencing by leaving courts to impose cumulative sentences for multiple counts of fraud. In the first place, liability should be in the hands of the jury to find the facts establishing the organised nature of the offence. This is important symbolically and, as a matter of justice under our system, should be determined by the jury rather than left to the relatively less stringent processes of fact-finding at the sentencing stage.

Second, reliance on the courts to impose cumulative sentences in these cases is unacceptable given the propensity of courts to give concurrent sentences and to sentence white-collar criminals leniently. In any event, the use of multiple counts in complex fraud cases rather than sample counts leads to very long and costly trials. This can be avoided by the use of a "rolled-up" organised fraud charge.

115 ACT: s76 *Proceeds of Crimes Act 1991*, *Criminal Justice Act* 1988. (UK) See Wood, "The Serious Fraud Office" [1988] Crim LR 182.

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Failure to include such an offence will be characterised as a watering down of efforts to combat organised and white-collar crime.

Much has been made of the fact that the Commonwealth provision has been used infrequently. Whether a provision has been used is irrelevant - the fact that it is unusual to see a charge of treason does not mean that there is no need for the offence. In any case, the Commonwealth provision was only enacted 5 years ago and there are some aspects of that offence which may require improvement.

While the nomination of three offences is arbitrary, it is often necessary to provide for arbitrary limits. However, reliance on this criterion alone is not sufficient. The other criteria should be:

- the fact that there were two or more people involved in the offences;
- the presence of "substantial planning and organisation" either as a broad criterion or expressed in a more specific form such as "a series of events which occur either simultaneously or over a defined period of time as a result of substantial planning and a pattern of conduct";
- the use of sophisticated methods or techniques; and
- the three offences are all serious offences of fraud or theft.

Concerns about the misuse of this offence in relation to multiple Social Security offenders are misguided. The criteria proposed would eliminate the vast majority of Social Security offenders who by and large use unsophisticated methods. However, where there is substantial planning, then no matter who it is, the level of criminality is greater and therefore deserves more substantial penalties.

Consequently, it is appropriate to include an "organised" offence limited to fraud and theft because they are more likely to involve substantial planning and organisation and to involve the white collar criminal.

Arguments against

The major argument for a new offence of organised fraud is to reflect the true criminality associated with *organisation* of fraud. Most people would agree that organisation reflects greater criminality and merits greater punishment. But there is no evidence that the existing law does not cope with the problem. Indeed s83 of the Commonwealth *Proceeds of Crime Act* has been used infrequently. Nor does there seem to be any reason in principle why organised fraud rather than organisation to commit other types of offences (eg theft, drug offences, prostitution offences, paying off police and other officials) merits a special offence.

The difficulties of defining what is meant by *organisation* creates additional problems. Attempts to define the element of "organisation" have proceeded on

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two fronts. The first focuses on the number of people engaged in the enterprise. However, there is a substantial overlap here with the rationale for the offence of conspiracy. One of the primary reasons for conspiracy is to capture the true criminality of organised criminal conduct involving a number of people. Unlike the proposal for an organised fraud offence, conspiracy has the virtue that it is available across the range of serious offences. Even given the criticisms of conspiracy, it is a better solution to cases where the additional criminality is supplied by the number of people involved.

A second approach focuses on the number of offences committed. For example, the organised fraud offence in the *Proceeds of Crime Act* nominates three offences. Such a numerical measure is inevitably arbitrary and not a necessary indicator of the sort of "organised fraud" associated with the large scale operation contemplated by those proposing this sort of offence. Social security fraud, to give just one example of the potential for overreach, would routinely involve multiple incidents of fraud involving "substantial benefits" and "substantial planning" - often by people in very stressed circumstances who typically submit false forms fortnightly over a long period - to mention two of the criteria suggested for the organised fraud offence. Leaving such crucial definitions to be dealt with in the Explanatory Memorandum or DPP Guidelines as is currently the case is totally unacceptable.

Under existing law, where there are a large number of offences, the prosecution will usually charge a number of offences or select certain offences - sometimes referred to as the first, the worst and the last. Where the jury convicts of these offences, it is then up to the judge to sentence on the usual sentencing principles relating to concurrent and cumulative sentencing. There is a presumption in favour of concurrent sentences unless that would not reflect the true nature of the criminality. It is common for sentencing judges to impose cumulative or partly cumulative sentences to reflect the true criminality of the conduct in multiple count cases. As the former Commonwealth DPP pointed out, it is hard to understand why s83 was enacted given that the maximum sentence range where a person is convicted of three counts of fraud - as they have to be under the Commonwealth provision - is 30 years (ie 5 years *more* than the 25 year maximum for the organised fraud offence).[116] There is unlikely to be a significant difference in the sentence imposed if the organised fraud offence is charged. It is unrealistic to think that discrepancies in sentencing white collar criminals will be solved in this way.

The sentencing discretion is also the most appropriate way to deal with the element of substantial planning and organisation sometimes suggested as an additional criterion for an organised fraud offence. Additionally, there are practical advantages in terms of court time and costs in dealing with these

116 M Weinberg, "The *Proceeds of Crime Act* - New Despotism or Measured Response" [1989] 15 *MULR* 217.

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matters at sentence rather than as ill-defined elements to be litigated at trial. Moreover, recent sentencing practice shows an increasing willingness by courts to impose very substantial sentences for serious fraud.[117]

Elaborate frauds should in general be punished more severely than simple frauds, though it should be pointed out that this is not necessarily the case: a fraud of audacious simplicity may be just as culpable and reap just as much as a more complex and organised fraud. Similarly, a social security fraud may involve substantial planning and organisation, and continue over a long period during which a fraud was committed on a fortnightly basis as false claim forms were submitted. Yet the sort of defendants regularly convicted of frauds which satisfy these criteria are not the people envisaged by those who advocate organised fraud offences.

An organised fraud offence which accurately targets the sorts of people it is intended to target defies reasonable definition. Such defendants are relatively rare and the culpability has more to do with the scale of their operation and the absence of mitigating factors than it does with organisation. These are matters which are typically dealt with in sentencing. Creation of a separate offence to deal with them runs the risk of over-complicating the law and drawing in people who are not the objects of the offence. These risks are not justified, especially in view of the fact that the existing law is adequate to deal with them.

None of the States currently has an organised fraud offence and neither does the Northern Territory. The new Queensland code has one (s 272). The ACT followed the Commonwealth in including an organised fraud offence in its Proceeds of Crime legislation. No such offence is in any of the proposed Model Criminal Codes.[118]

One reason suggested for the Commonwealth and ACT organised fraud offence is that it provides the trigger for the *automatic* forfeiture provisions of their *Proceeds of Crime Acts.* None of the States or the Northern Territory has an equivalent. If the Commonwealth and the ACT wanted to retain automatic forfeiture, the trigger mechanism could be provided by other means. For example, where a person is convicted of three or more offences against s29B of the *Crimes Act (Cth)* and the amount obtained exceeded $100,000.

117 For example, a recent Victorian case (*Gibson* 1993) in which an investment adviser defrauded a large number of people of their retirement funds, a sum totalling some $6.5million and was sentenced to a maximum term of 12 years in prison. Since 1993, no remissions apply to sentences in Victoria. This is equivalent to an 18 year sentence prior to the abolition of remissions. In *Talia* (1994), a fraud case involving $65 million, the defendant was also sentenced to 12 years. The *Gibson* case has become something of a benchmark in this area.

118 The US *Model Penal Code*, the English *Draft Code*, the Canadian *Draft Code* or the NZ *Crimes Bill,* O'Regan. Gibbs deals with s83 briefly. Responding to submissions calling for special provision to deal with cases such as a series of welfare frauds, it quotes at length from submissions pointing out the difficulties with such charges. It says that given the heavy penalty attached to s83, prosecutors would be cautious about laying charges under it. It concludes that given the existence of s83, it would not recommend another provision but, given the seriousness of the penalty, s83 should be in the *Crimes Act,* Gibbs: 151-156.

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Conclusion

The overwhelming number of submissions - including those from Mr Justice Murray, the Department of Social Security and 3 state police forces - opposed the inclusion of an organised fraud offence. Three submissions supported it. MCCOC concludes that the arguments against an organised fraud offence are more persuasive.

Recommendation

The MCC should not include an organised fraud offence.

False statement by officer of organisation

19.8 (1) An officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly publishes or concurs in publishing a document containing a statement or account that to his or her knowledge is or may be misleading, false or deceptive in a material particular is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

(2) In this section:

"creditor" of an organisation, includes a person who has entered into a security for the benefit of the organisation;

"officer" of an organisation, includes any member of the organisation who is concerned in its management and any person purporting to act as an officer of the organisation;

"organisation" means any body corporate or unincorporated association.

Fraud involving corporations

The thrust of the *Theft Act* approach is to use the same basic theft or fraud provisions regardless of the identity of the defendant or the victim. This applies equally to companies and their officers. Thus, if a company or its officers commit a fraud, they ought to be charged under the normal criminal law provisions - such as those contained in ss17.2 and 17.3. This is no more and no less than a principle of equal treatment. Fraud should not be punished more or less leniently just because it occurs in a corporate setting. Offences short of fraud with special relevance to corporations should be dealt with under the *Corporations Law*. To the extent that such conduct constitutes fraud either by an officer or a corporation, it can and should be prosecuted under the general criminal law (eg the proposed s17.2).

However, the argument of principle has to take account of practical difficulties in dealing with frauds involving companies. MCCOC has had a submission from the Commonwealth DPP suggesting that there should be a separate fraud offence in the *Corporations Law* to overcome handover difficulties between the ASC and State police forces where ASC investigators discover conduct which breaches State Crimes Act fraud offences. The DPP's concern is that some cases are "falling between the cracks" under the new *Corporations Law* arrangements and that some State police forces now regard frauds involving corporations as a Commonwealth responsibility and yet the Commonwealth DPP does not have the power to lay charges under State/Territory criminal law.

As stated, MCCOC believes that the correct approach in principle is to prosecute all frauds under the same *Crimes Act/Criminal Code* provision. This makes for uniformity in charging and sentencing with other frauds. It also avoids the difficult problem of knowing which other criminal offences disclosed by a company investigation - like forgery, theft, and so on - would need to be brought over to the *Corporations Law* if this approach were to be adopted. But there should be no suggestion that by having a special provision in the *Corporations Law*, corporate fraudsters are in a different position from any other fraudster. It may be that the best solution to the handover problem is to vest the Commonwealth DPP with power to lay State *Crimes Act* fraud charges where ASC investigations disclose that an offence has been committed. There is some precedent for this type of arrangement between the DPP's already where investigations reveal breaches of the *Corporations Law* and State *Crimes Act* provisions.

All the jurisdictions have offences which make it an offence for a company director, officer or member to make false statements to shareholders or investors with intent to deceive them. The elements of the offence vary widely. In some jurisdictions it is sufficient that the defendant is a director or officer of the company and intends to make a statement that is false or misleading, in others there is need to prove intent to deceive and dishonesty. The maximum sentence tends to be around 7 years. These offences have now been largely superseded

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by the *Corporations Law* which contains a separate regime of offences in relation to officers of companies which was the subject of amending legislation in November 1992. These offences were presumably drafted against the background of the existing *Crimes Act* offences but the *Corporations Law* was prepared under great pressure and the relationship between the *Corporations Law* offences and the *Crimes Act* offences is not well worked out. The offences of forgery and false accounting should be mentioned in this context (see below). There are also false and misleading statement offences in the *Trade Practices Act* and the relationship with these offences is also not well worked out.[119]

Offences short of fraud with special relevance to corporations should be dealt with under the *Corporations Law.* Although the crossover point between the two areas will sometimes be hard to draw, it would be unwise at this stage to remove the false statements by company directors from the criminal law proper. The Commonwealth DPP expressed concern at both the extent to which the *Corporations Law* covered the areas currently covered in the *Crimes Acts* and offered sufficient sentencing range. In addition there are corporate entities not covered by the *Corporations Law,* like statutory corporations and incorporated associations. For that reason, s19.8 has been included in the *MCC* but with the possibility that it will be subsumed within the specific framework of the *Corporations Law* or other specific schemes at some point.

Section 19.8 is based on s110 of the ACT *Crimes Act*, which differs in several respects from the equivalent provisions in the *Theft Act* (s19). Section 19.8 combines aspects of both provisions. The ACT provision only applies to unincorporated associations, but for the reasons outlined above, this section will apply to the range of corporate entities. The fault elements of the offence include dishonesty, intent to gain or to cause loss, and knowledge that the statement is false or misleading in a material particular. These elements are similar to the false accounting offence (s19.7). The statements must be intended to deceive members or creditors of the association. These elements locate the offence one step short of an attempt to obtain property or a financial advantage by deception and warrant a penalty of 7 years and six months, equivalent to the penalty for false accounting.

Recommendations

Fraud involving corporations should be prosecuted under the normal criminal law. The Corporations Law should not include a separate fraud offence.

119 The *Theft Act* version of this offence is s19. See Vic: s85. The ACT variant (ACT: s110) only extends to unincorporated associations. and requires proof of intent to gain or cause loss. NSW:110; NT: 234; Qld: 438; [not in Qld (New)] SA:s192; Tas:282; WA: 420. The *Corporations Act* 1989 s232 contains the substantive offences but s.1317FA (inserted November 1992) provides the fault elements which must be satisfied in order to prove that a breach of s.232 is criminal. The maximum penalty for these offences is 2 years. *Trade Practice Act 1974* (Cth) offences: s53, s53A, 53B, 53C.

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Less serious cases of theft and fraud

The traditional method of dealing with less serious cases of theft and fraud is to make offences involving less than a certain amount triable summarily. Summary offences carry lower penalties, lighten the burden on the prosecution by removing the need to prepare a hand-up brief and save the cost and time of a jury trial for both the prosecution and defence.

Most of the States and Territories have provisions for exercising summary jurisdiction in theft and fraud where the amount involved is below a certain amount. For example, in NSW, where the amount is less than $5000, summary procedure is automatic if the prosecution fails to elect to prosecute on indictment. For amounts over $5000, the prosecution and the defendant retains the right to a jury trial. In Victoria, certain offences may be heard summarily subject to them involving less than $25,000, the magistrate's decision about their appropriateness for summary determination, and the consent of the defendant. The magistrate may not impose a sentence of more than two years imprisonment [120].

The right to a jury trial for an offence of dishonesty - even if the offence only involves a small amount and if it is only exercised rarely - should not be disregarded. Conviction for a dishonesty offence may disqualify a person from a range of occupations and activities. Nevertheless, the costs associated with the maintenance of this right must be weighed against rights foregone in other areas due to shortage of funds. Moreover, increasingly magistrates are legally qualified, thus removing one of the impediments to conferring jurisdiction in more serious cases. The case for making the rules in relation to summary hearing of theft and fraud cases involving small amounts more flexible is made out. The question of the amounts remains. MCCOC concludes that up to $1000 is the appropriate amount for mandatory summary jurisdiction.

From $1000 to $15,000, jury trial should be available at the option of defendant. The magistrate should be entitled to decline summary jurisdiction within that range because the matter is too complex, the sentencing range would be inadequate if defendant were convicted, or for any other reason it would be inappropriate to deal with the matter summarily. The decision of a magistrate to exercise this summary jurisdiction should be subject to appeal. Jury trial should be mandatory for amounts in excess of $15,000. The unlawful use of cars offence (s16.5) should be hearable summarily despite the value of the car.

Some have argued that there are minor instances of dishonest activity - involving perhaps amounts less than say $150 - which should be decriminalised because they do not warrant the stigma of prosecution for the more serious categories of theft nor the expense of prosecuting them. It is suggested that shoplifting

120 NSW: Sections 476, 496 & 497. Vic: s53(1) and Schedule 4 *Magistrates Court Act 1989* and s113 *Sentencing Act 1991.*

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involving items whose value is less than $150, for example, might be dealt with by means of governmentally enforced civil remedies such as restitution.[121] Alternatively, the system of on-the-spot fines might be extended to these sorts of offences.

Against these arguments, it is said that the offence of theft is serious and so are the consequences of conviction. To have these offences dealt with administratively would breach a fundamental principle under our system that criminal offences are dealt with by the judiciary, not the executive. Nor is it appropriate to use on-the-spot fines for offences where the liability is not objectively measurable as it is in the case of speeding and breathalyser offences. Ironically for those who advocate these approaches to avoid stigma for defendants, the fact that the prosecution is unlikely ever to have to prove its case in court and the fact that the collection of the fines is relatively inexpensive, is likely to lead to a far higher number of prosecutions where currently there might be no more than a warning.

Submissions on the issue of the limits of summary jurisdiction varied widely: no clear trend of opinion could be discerned. The limits on jurisdiction proposed by MCCOC are widely applicable and the Committee continues to believe they are appropriate. The idea that theft or fraud involving small amounts should be decriminalised or dealt with administratively through on-the-spot fines did not attract many submissions. No clear trend emerged from these provisions. MCCOC does not favour these approaches and believes that the options for summary jurisdiction outlined above supply the minimum standard of court supervision for offences of dishonesty.

Recommendation

Theft and fraud involving property worth a small amount of money should not be decriminalised or dealt with administratively or by on-the-spot fines.

121 For example; Huber, 'The Dilemma of Decriminalisation: Dealing with Shoplifting in West Germany' [1980] *Crim LR* 621; Fisse p 314 ff.

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PART 3.4 BLACKMAIL

Introduction

Blackmail is basically the unwarranted demanding of property with menaces. The offence is akin to robbery but there are two principal differences. First, unlike robbery, the offence of blackmail is complete when the demand is made - the property does not have to have been obtained. There is a similarity to attempted robbery, except that for attempted robbery the threat of force must be immediate, whereas for blackmail the threat may be of force which will not occur until some time in the future. Second, for blackmail a wider range of threats will suffice; it is not confined to the use or threat of *force*. Thus an alleged threat by unions to disrupt the Australian Open Tennis Tournament over bans on South African players because of apartheid would constitute a menace. Assuming the threat could be proved, the issue would be whether it was an unwarranted threat.

The various jurisdictions have a number of different blackmail offences of varying severity depending on the type of threat (eg threat to publish), the way it was communicated (orally or by letter), and the type of intent (with intent to steal, with intent to gain, without reasonable cause). For example, the New South Wales *Crimes Act* contains six separate offences dealing with blackmail. Consistentl with its overall approach, the *Theft Act* model dispenses with such distinctions and reduces the number of offences to one. MCCOC concludes that the single offence approach is preferable. A submission from New South Wales Magistrates applauded this simplification.[122]

Blackmail has come to cover a range of offences which would previously have been defined as extortion, an offence originally confined to officials but subsequently broadened to cover people who are not officials. Extortion was defined to mean "the taking of money by any officer by colour of his office, either where none at all is due, or not so much is due, or it is not yet due". Where the case involves a threat, blackmail covers the situation. Where the threat is simply the fact that a person holds a particular office, the definition of menace in s18.3(1)(b) covers the situation. The offence of extortion was abolished in England by the *Theft Act* 1968 on the recommendation of the English Criminal Law Revision Committee. No explanation was given in the Report for the abolition, but presumably this course was thought appropriate having regard to the general provisions of the new *Theft Act*, including section 21 dealing with unwarranted demands with menaces. Victoria took a similar course in 1973.[123]

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122 See NSW: s99-103. The offences in the other jurisdictions are as follows: ACT: s112; NT: s228; Qld: s414-417; Qld(New) s169; Vic: s87; SA: ss159-165; Tas: 241-2; WA: ss396 - 399. On forgery and false accounts, generally, see Williams and Weinberg, chaps. 5-6.

123 Williams and Weinberg, 320; Fisse, 263-8.

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Extortion also overlaps to some extent with bribery. That overlap is dealt with in the discussion of bribery and other corrupting benefits (below). In view of the fact that the offences of blackmail, bribery and other corrupting benefits will cover the area formerly covered by extortion, the *MCC* will not include a separate offence of extortion.

Recommendation:

The MCC should not include a separate offence of extortion.

PART 3.4 - BLACKMAIL

Division 18

Blackmail

18.1 A person who makes any unwarranted demand with menaces:

(a) with the intention of obtaining a gain or of causing a loss; or

(b) with the intention of influencing the exercise of a public duty,

is guilty an offence.

Maximum penalty: Imprisonment for 12 years and 6 months.

Unwarranted demands - interpretation

18.2 (1) A demand is unwarranted unless the person believes that he or she has reasonable grounds for making the demand and reasonably believes that the use of the menaces is a proper means of reinforcing the demand.

(2) The demand need not be a demand for money or other property.

Menaces - interpretation

18.3 (1) For the purposes of this Division, menaces includes:

(a) an express or implied threat of any action detrimental or unpleasant to another person; and

(b) a general threat of detrimental or unpleasant action that is implied because the person making the unwarranted demand holds a public office.

(2) A threat against an individual does not constitute a menace unless:

(a) the threat would cause an individual of normal stability and courage to act unwillingly in response to the threat; or

(b) the threat would cause the particular individual to act unwillingly in response to the threat and the person who makes the threat is aware of the vulnerability of the particular individual to the threat.

18.1 - Blackmail

Section 18.1 is based on the *Theft Act* offence of blackmail. It consists of the following elements:

Physical elements

- the making of an unwarranted demand
- with menaces.

Fault elements

- intent to make a demand;
- intent to menace;
- absence of a belief that there are reasonable grounds for the demand;
- absence of a reasonable belief that the use of menaces is a proper means of enforcing the demand;
- the intention of making a gain for the defendant or another, or the intention of causing loss to another, or influencing the exercise of a public duty.

Physical elements

18.2(2) Unwarranted Demand

The physical elements of the offence consist of making an unwarranted demand with menaces to another person. A demand may be oral or in writing and will be regarded as a demand if an ordinary person would regard the communication as a demand. This element of the offence is straightforward. The nature of the demand does not matter. It does not have to be a demand for money or property. It could be a demand to do or refrain from a particular act (s18.2(2)), however, the demand must be made with the intent to obtain a gain or cause a loss or to influence the exercise of a public duty(s18.1 and s14.3). Thus a demand that the victim nominate the defendant for an honorary office would not be included in this offence (see below).[124]

The demand must be unwarranted in fact. This means in effect that the demand has no basis (eg that no money was owed) or that the threat was in fact not proper in the circumstances. In most cases this will not be an issue because the charge of blackmail would not be brought. There may be cases where the defendant believes he or she has no ground for making a demand but in fact he or she does (eg the defendant believes no money is owed, but in fact it is). In such a case, the defendant could be charged with an impossible attempt (s-11.1(4)(a)MCC).

124 Smith, 10-02 - 10-04; WIlliams and Weinberg, 342.

(3) A threat against a Government or body corporate does not constitute a menace unless:

(a) the threat would ordinarily cause an unwilling response, or

(b) the threat would cause an unwilling response because of a particular vulnerability of which the person making the threat is aware.

(4) It is immaterial whether the menaces relate to action to be taken by the person making the demand.

18.3 Menaces

The demand must be reinforced by words or conduct amounting to a menace. People make demands of others all the time without it being a criminal offence. For blackmail, the demand must be backed by a menace. Menaces have been interpreted to extend beyond violence and to include, "threats of any action detrimental to or unpleasant to the person addressed". This very wide definition has been modified in subsequent cases so that the essential feature of the menace is that it overbears the person's freedom to choose whether to part with his or her property. Examples of actions found to have constituted menaces in this sense have included threats to publicly accuse a person of a sexual offence, or to have a person prosecuted for an offence, and to set fire to the person's house. The threat may be that the menace will be carried out by the defendant or some other person (s18.3(4)). The *Theft Act* does not contain a definition of menaces. The Committee recommended a statutory definition in DP2. Section 18.3 is an inclusive definition based codification of the common law cases with two additions.[125]

First, submissions pointed out that some victims would have special vulnerabilities which would cause them to act unwillingly when a person of normal stability could withstand such a threat. The blackmailer may trade on that special characteristic. For example, a threat to tell everybody that the victim is a drinker may not cause a person of normal stability and courage to act unwillingly but it might well cause a devout member of a teetotal religion to do so. Under s18.3(2)(b) this would be a menace but the prosecution would have to prove that the defendant knew of the special vulnerability.

Second, there may be some doubt how menace is to be interpreted in cases where the victim of the threat is a government or a corporation. Section 18.3(3) specifies that for threats against a government of corporation would be such as to make the government or corporation act unwillingly. This is to be judged by reference to the attitudes, rules etc of governments and corportations generally. Alternatively, if there is a special vulnerability of the government or corporation, s18.3(3)(b) applies.

Fault elements

The fault elements for blackmail require that the defendant intend to make a demand on another person and intend to reinforce that demand with a menace. This must be done with the intention of making a gain or causing loss. The meaning of "demand" and "menace" has been discussed above. The primary fault elements for the offence relate to the defendant's beliefs about the basis for the demand and the propriety of using threats to reinforce that demand. The

125 *Thorne v Motor Trade Association* [1937] AC 797 and *R v Harry* [1974] Crim LR 32. See Smith, 10.05-10.09; Williams and Weinberg, 322-324.

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case of a person who makes a demand backed by threats but has no basis for a demand is relatively straightforward. The more difficult case involves the person who believes the demand is justified. The problem is to determine when the threats to enforce that demand cross the threshold of what is proper.

18.2 - Defendant's belief

Not all demands with menaces count as blackmail. The fault element of the offence is to make an *unwarranted* demand. Whether the demand is warranted (eg whether a sum of money is owed) and whether the menace is warranted (eg whether that type of threat is a proper means of enforcing that demand) distinguish criminal from non-criminal demands backed by menaces. If a demand for payment is backed by a menace (eg a threat to sue), that is not blackmail if the debt is owed; a threat to sue for that debt is a proper means of enforcing that demand.

A demand is unwarranted if the prosecution can show that the defendant either:

- did not believe that he or she had reasonable grounds for making the demand; *or*
- did not reasonably believe that the use of menaces was a proper means of backing the demand.

The test for the first limb of the test is subjective: did the *defendant* believe there were reasonable grounds for making the demand. The test for the second limb is objective: did the defendant *reasonably* believe that the use of the menace was a proper means of enforcing the demand.

Under the *Theft Act (UK)* and in the jurisdictions that have followed it, the test for whether a menace is proper is subjective. In the non-*Theft Act* jurisdictions, the test of whether the demand or the threat was proper is *objective*: The objective test was criticised by the Criminal Law Revision Committee because it had led to cases such as *Dymond* where a woman had written to a man who she alleged had sexually assaulted her demanding that he apologise and pay her money. If he did not, she threatened to "summons" him and "let the town know all about your going on". The fact that the threat was construed as a threat to bring a *criminal* rather than a civil prosecution was found to be improper, despite the fact that the woman believed it was proper and that she would have been entitled to threaten civil action. (For example, it is not blackmail to write a solicitor's letter demanding compensation for a negligently caused injury, threatening to bring a civil action for damages if the compensation is not paid). It was also said to be improper to threaten to tell the town about it, though it would not be improper to tell the town that he refused to pay the damages in respect of the civil assault claim. These are very fine distinctions for a serious offence like blackmail.

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However, as the example above of the alleged threats to disrupt the Australian Open over apartheid shows, the *propriety* of the menace can be the crucial factor in deciding whether blackmail has been committed. In that case, the Victorian DPP decided not to prosecute because evidence of the threat was weak. Had the threat been proved, the issue would have been whether such a threat was thought to be proper within the political debate on the issue of apartheid. Similar considerations apply to threats of strike action over for pay increases and the like. They seldom if ever produce prosecutions for blackmail. Under the *Theft Act* provision, the defendant would not be guilty of the offence if he or she believed the threat was a proper means of enforcing the demand.

Critics of the subjective test for whether the threats are proper say it is inconsistent with the test for dishonesty which has objective components and unduly favourable to defendants, especially those who may have divergent beliefs about propriety. Supporters of the subjective test say that people who have a genuine belief in the propriety of their actions should not be convicted of blackmail. There is special force to this in cases where the defendant actually does have a genuine legal claim. No doubt, the law cannot sanction illegitimate means of collecting lawful debts but, where the defendant has a legitimate claim and *believes* the threat is a proper means of collecting that debt, to convict of blackmail is severe. To the extent that there is a concern about unmeritorious acquittals, people who claim that threats were proper - when reasonable people would not - will be disbelieved by the jury. It can also be said that two different tests will be confusing for juries.[126]

In DP2, MCCOC recommended an objective component in the assessment of the propriety of using threats. This is consistent with other evaluative types of fault element like the *Feely/Ghosh* test for dishonesty and the evaluative elements in the general defences of self-defence, duress and necessity. Submissions strongly supported this recommendation.[127]

-With the intention of making a gain or causing a loss

The final fault element for blackmail is that the defendant must make the demand with a view to *gain* for himself, herself or another, or with a view to causing *loss* to another. These terms are the *Theft Act* (UK) substitutes for the common law requirement that there be a demand for *property*. That requirement is found in the statutory definitions of blackmail in the Australian jurisdictions. Because the definitions of "gain" and "loss" in 14.3 restrict this to gain or loss in money or property, demands for things which are non-pecuniary or non-proprietary are not included. Thus, for example, it would seem that a demand - backed by a threat to be appointed to a prestigious honorary position or to get a building approval, for example, would not be caught. Demands for sexual

126 Williams and Weinberg, 345-347 criticise the objective test; cf Smith, who supports the subjective test, 10.23-10.32.

127 See s.10.4-10.2 in chapter 2 of the *MCC.*

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relations would also not be covered. However, demands for sexual relations backed by threats are more appropriately dealt with in the context of sexual offences. Although some submissions favoured a wider approach, the majority of submissions and each of the consultation meetings favoured confining blackmail to economic loss. A similar issue arises in forgery where there is a question of whether intent to defraud extends beyond causing economic detriment (see below).[128]

In DP2. MCCOC concludes that the traditional limitation on blackmail - demands for money or property - should remain and this limitation was supported both in submissions and at the consultations.

18. - Penalty

The penalty for blackmail is a maximum of 12.5 years. The penalty should follow that for burglary and robbery because the illegitimate obtaining of property or money is accompanied by a threat which may be a threat of violence.

128 Victoria, NSW and the ACT adopt the *Theft Act* definitions of gain and loss. Vic: s71(1); NSW: s100A; ACT: s93; SA: ss159-165 specify the different types of property demanded. Tasmania also covers gains or losses: s241. Cf Qld(New) which specifies, "property or benefit or the performance of services" (s415). In Western Australia, s397 applies to demands for "anything" and includes requiring someone to do or refrain from doing something. The Northern Territory covers benefit, detriment or injury but does not define the terms: s228. See too Williams and Weinberg who argue that non-proprietary benefits ought to be included, 342-345. Services obtained for free which would have had to be paid for but for the menaces would be caught under the *Theft Act* definitions of gain and loss.

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FORGERY

Introduction

Most *Crimes Acts* and the Criminal Codes contain provisions relating to false documents: forgery relates to false documents in general; offences like false accounting relate to special documents like accounts and suppression of documents relates to documents like wills and valuable securities. Again, the Victorian provisions will be used as the basis for discussion because they are located in a *Theft Act* framework. The Victorian provisions all follow existing English provisions which have also been included in the English Draft Criminal Code. The English forgery provisions have also been adopted in New South Wales and the ACT.

There are a variety of differences between the jurisdictions in their forgery offences and their other offences. For example, in most jurisdictions the false accounting offence is restricted to a "clerk or servant" whereas the Victorian provision relates to *any person* who falsifies an account. This is more consistent with the *Theft Act* approach of more general offences focusing on the substance of the behaviour - dishonest falsification of documents - rather than multiple offences based on the status of the offender, or the victim, or the category of document. Western Australia has the most general offence: falsifying records with intent to defraud.[129]

These offences differ from fraud because the defendant has not necessarily *obtained* property or a financial advantage. The defendant has merely falsified a document or account *with the intention of making a* personal gain or causing detriment to another. This does not necessarily go far enough to constitute attempted fraud. The essential fault elements of this group of offences are:

- dishonesty;
- with the intention to gain for the defendant or another, or to cause a loss to the victim;
- intent to falsify, destroy, deface, or conceal a document.

The differences between the Victorian offences depend on:

- the type of document: any document (forgery, s83A); an account (false accounting, s83); a valuable security, will, etc (suppression of documents, s86);
- what is done with the document: make, use or possess a false document, or make or possess implements for making false

129 See Vic: s83, 83A, 86. And see s161-71 *English Draft Criminal Code* 1989. For the forgery provisions in NSW: s299-307 (but note ss250-298 for offences relating to the forgery of certain sorts of documents); ACT: s135A-135G; NT: s258-269; Qld: s484-513; Qld(New): 176-187; SA: s212-236; Tas: s277-287; WA: s424.

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documents (s83A); destroy, deface, conceal, or falsify (s83); destroy, deface or conceal, or by deception, procure the execution of a valuable security (s86);

- the fault element: to use the false document to induce another to accept it as genuine and cause detriment to the victim (s83A); dishonesty with a view to gain for the defendant or to cause loss to the victim (ss83 and 86);
- The maximum penalty for each of these offences is 7.5 years.

Should these offences be retained?

These offences essentially concern the falsification of documents in order to commit fraud. Some have argued that they should be abolished. The first step in this argument is to notice that it is not an offence to make a false oral statement, even with a view to committing fraud. A false oral statement will only be an offence if it comes close enough to the completed fraud to constitute an attempt. Even forgery does not apply to all false *written* statements. Forgery at common law applies to false *documents*, not false *statements* contained in documents. As the English Law Commission said, it had been established by the middle of the nineteenth century that, for the purposes of the law of forgery, whether a document was false was determined not by whether it told lies but whether it told a lie about itself.[130]

The Mitchell Committee in South Australia found this distinction unmeritorious. It recommended abolition of forgery in favour of reliance on the law of fraud and attempted fraud. This would be supplemented by an offence of fabricating or tampering with an official document with intent to affect the discharge of official duties and an offence of possession of a false document (ie a document containing a lie) with intent to use it to obtain by deception or with intent to commit the official documents offence.[131] The submission of the Society of Public Teachers of Law to the English Law Commission's Reference on Forgery argued that there is no need for such offences at all. The law of obtaining by deception, supplemented by attempt, cast the net of protection wide enough. There is no need to keep offences in relation to documents which *might* be used to perpetrate a fraud or attempted fraud. In essence, forgery broadens the law of attempt well beyond what would be tolerated for other offences. The Law Commission's response to this was as follows:

> The premise upon which their argument is based is that there is no social need to penalise generally the making of documents which give a false impression of their authenticity. There is a number of reasons for not accepting the soundness of this premise.

130 (12th ed.1227). The High Court adopted this distinction in *Brott* (1992) 105 ALR 189.

131 South Australia, Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law*, 1977 at p265-72.

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> In the many and varied activities of modern society it is necessary to rely to a large extent on the authenticity of documents as authority for the truth of the statements which they contain. Indeed, in the vast majority of forgery cases the purpose of the forger is to lull the person to whom the document is presented into a false position in which he will be unlikely, because of the apparent authenticity of the document, to make further enquiry into the correctness of the facts related. The same is not true of false statements contained in a document which carries no spurious authenticity. A letter by an applicant for an appointment setting out falsely his qualifications is in quite a different category from a letter of recommendation purporting to come from a previous employer.[132]

The Law Commission did not see the need for extension of forgery to cover mere false *statements* that are reduced to writing: it attempted to codify the common law position on false documents. MCCOC accepts the need to protect the integrity of documents. But the distinction between a document containing a lie and a document which lies about itself is not always easy to draw, as the recent High Court decision in *Brott's* case shows.[133] In that case, Brott witnessed the signature clause of a guarantee saying that both guarantors were present when he signed. This was not true as, unbeknownst to Brott, one of the guarantors had died that morning. The High Court found that the statement was false but that the document was not. It purported to be a guarantee by the two guarantors and it *was*. In any event, the Law Commission's definition of forgery appears to be wider than the common law.

The Law Commission definition of "false document" (see *Model Criminal Code* ss19.1 and 19.2) does not require that a document "tell a lie about itself", nor that the falsity should go to the "character and effect" of the document, nor that the falsity be material. The common law anomaly that made a document a forgery if the defendant put a false date or time on his or her *own* document *and* the date or time is material, is broadened by omitting the requirement of materiality and extending the rule to include a false place or false circumstances (eg the situation in *Brott* where the false circumstance is the assertion that the guarantor was present). On one view, s9(2) of the *Forgery and Counterfeiting Act* 1981 (UK) may extend to any alteration to falsify a document (authored by the defendant or another person) in *any* respect; the alternative view is that this sub-section only intends to preclude an argument that you cannot forge a document which is already false. Section 19.2(2) makes it clear that the alteration cannot be in *any* respect and has to fall within the categories established in s19.2(1).

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132 Law Com.55,para 42.

133 *Brott* [1992] 66 ALJR 256, esp Deane J at 259 and McHugh J at 263.

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Should forgery extend to all false statements in documents?

The majority of the High Court in *Brott* found that his false statement in the attestation clause did *not* constitute forgery because the document did not lie about itself even though it contained a lie.[134] However, Mr Justice Deane thought that Brott would have been caught by the terms of codified forgery provision in the Victorian *Crimes Act* 1958 (s83A) had it been in operation at the time. The width of the Law Commission definition of what amounts to a false document in the forgery legislation (which has been adopted in England, New South Wales, Victoria and the ACT), further erodes the false document/false statement distinction.

-Arguments for including all false statements

The logic of the false document definition suggests that forgery has become a general offence about making false statements in documents with the intention of inducing another person to accept the statement as true and to act to his or her detriment. If this is correct, the real vice addressed by the offence of forgery is to make false statements - or at least a great many of them - in a written form, thus giving them a spurious authenticity. If this is correct, it would be sensible to go the next step and to have forgery cover all intentionally false statements in documents made with the fault elements of forgery. Western Australia has done this in s424 of its *Criminal Code*. To adapt the Law Commission's example, why should it be forgery for a job applicant to attach a false reference from a former employer to a truthful letter of application, but not forgery if the application itself is full of lies but the reference is genuine? The answer cannot be simply that the applicant actually *was* the author of the false application and that forgery only applies where the pretence is that a third party authored the document or some part of it. In some cases, the applicant could be guilty of forgery of his or her own document (if the applicant had falsely dated his/her letter of application, that would be forgery (see s19.2(1)(g)). Nor can the rationale be that the applicant intended to lull the victim into a false sense of security with the reference and not the letter of application. That was the intent in both cases.

The obverse of the position taken by the Society of the Public Teachers of Law is to make forgery cover all false statements in written form made with the fault element for forgery. At the moment, the statutory definition of false documents is arbitrary. Logic suggests that the vice is giving false statements spurious authenticity by putting them into a written form rather than falsifying the *character* of a document.

134 See the discussion of the case in Goode and Leader-Elliott, "Criminal Law" in Baxt and Moore, *Annual Survey of Law in Australia 1992* at 221.

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-Arguments against including all false statements

Including all false statements in documents within the ambit of forgery would be a radical extension of the criminal law. It would criminalise a significant area of conduct that is not now criminal - the making or use of inaccurate documents in circumstances amounting neither to forgery nor to attempting to obtain property or financial advantage by deception. It would obliterate the special significance and seriousness of forgery which does not apply to mere inaccurate statements in a document carrying no spurious authenticity. Although the Law Commission definition of false document goes beyond the common law distinction between a document which contains a lie and a document which lies about itself, it stops well short of equating false documents with false statements contained in documents. The essential ambit of forgery is still restricted to documents which pretend to be authored by someone other than the defendant. The Law Commission approach has found favour in England, Victoria, New South Wales and the ACT.

Conclusions

MCCOC concludes that the authenticity of documents remains such an important interest that the offence of forgery should be retained. Some submissions favoured abolition of the offence on the basis that there was usually another charge available. MCCOC has concluded that the offence should be retained. Other submissions favoured the extension of forgery to all false statements in documents. However, to make all false statements in documents be forgery (assuming the fault element was also present) would be to press the interest in the authenticity of documents too far. On the other hand the common law distinction - between a document containing a lie and a document which tells a lie about itself - is too vague. MCCOC favours the Law Commission definition of false document (see s19.2).

PART 3.5 - FORGERY AND RELATED OFFENCES

Division 19

Definitions - general

19.1 (1) In this Part:

"document" includes:

(a) any paper or other material on which there is writing or on which there are marks, symbols or perforations that are capable of being given a meaning by qualified persons qualified or machines; or

(b) a disc, tape or other article from which sounds, images or messages are capable of being reproduced; or

(c) a card by means of which credit or other property can be obtained; or

(d) a formal or informal document.

(2) In this Part, a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to the document as if it were a genuine document.

(3) If it is necessary for the purposes of this Part to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove that the accused intended so to induce a particular person.

PART 3.5 FORGERY AND RELATED OFFENCES

The Law Commission definition of forgery the following elements:

Physical elements

- making, using, copying, possession of;
- a document;
- which is false.

Fault elements

- knowledge that the document is false;
- dishonesty;
- intent to induce another to accept the document as genuine;
- intent that by reason of the person accepting the document as genuine, to obtain a gain, cause a loss or influence the exercise of a public duty.

Physical Elements

19.1(1) - Document

The UK Law Commission recommended that forgery provisions should apply to any document in writing defined to include words, letters, figures and other symbols and any disk, tape, sound track or other device on or in which instructions are recorded or stored by mechanical, chemical, electronic or other means, but to exclude documents of only a historical interest. It does not include works of art like paintings, statues and the like. The Law Commission recommended against extending the definition of document to seals or dies, except dies provided, made or used by the Inland Revenue and the Commissioners of Customs and dies required or authorised by law for the hallmarking of gold or silver.[135] These recommendations were implemented by the *Forgery and Counterfeiting Act* 1981 (UK). Broadly similar approaches have been adopted in the NSW, Victorian, WA, NT and ACT laws. Section 19.1(1) follows that approach. MCCOC believes that there should not be an exclusion for historical documents and that the position with respect to seals and dies is adequately covered by the offences relating to possession of implements (ss19.6).[136] Credit cards are included as documents (s19.1(c)).

135 The UK Law Commission *Criminal Law: Report on Forgery and Counterfeit Currency* (No 55, July 1973).

136 The Law Commission said that, provided that it was an offence to make a false document bearing the impression of a seal, they saw no purpose in retaining an offence of making a false seal, Law Com. No.55, para 26.

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Because of its constitutional position, the Commonwealth has to restrict the *ambit* of these offences to documents with a Commonwealth connection. In all other respects, MCCOC envisages that the Commonwealth offences would follow the *Model Criminal Code*.[137]

Counterfeiting currency is in a somewhat different position. It is dealt with by separate Commonwealth legislation, the *Crimes (Currency) Act* 1981(Cth). Because of the specialised nature of currency, it is not proposed to bring it within the *Criminal Code*. The same considerations do not apply to forging of government securities - also dealt with in the *Crimes (Currency) Act* 1981(Cth) - which should be dealt with under the general forgery provisions of the *MCC*. As argued below, there is no necessary connection between classes of documents (eg public versus private, etc) and the severity of the offence.

19.1(2) - Computers

The definition of document includes information stored on computers.

The forgery offences require that the defendant intends to induce a person to accept a false document as genuine. The definition in s19.1(2) extends to cases where the defendant intends to use a false document to cause a computer or other machine to respond as if the document were genuine. The provision puts computers in the position of people for the purposes of accepting documents as genuine. The UK provision has an additional provision deeming the computer to be a person for the purposes of the definition of prejudice. This is unnecessary. The point is to protect the person who owns or is associated with the computer. Deceiving the computer is a means by which the forger obtains a gain or causes a loss to another person. The additional provision in the UK legislation lacks coherence and is unnecessary. The approach to computers is similar to the approach taken in relation to the deception offences (see s17.1(b)).[138]

137 Exactly the same issue arises in relation to theft and fraud. This deals with the constitutional position of the Commonwealth in a slightly different way than the Gibbs Committee had envisioned, *Fifth Interim Report*, Part IV. However, at that time a national *Model Criminal Code* was not on the agenda. The MCCOC approach promotes uniformity.

138 The additional provision in s83A of the *Crimes Act* 1958 (Vic) is:

(9)(b) if

(i) a machine so responds to a document or copy; and

(ii) the act or omission intended to be caused by the machine's so responding is an act or omission that, if it were an act or omission of a person, would be to a person's prejudice within the meaning of sub-section (1)

the act or omission intended to be caused by the machine's so responding shall be deemed to be an act or omission to a person's prejudice.

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-Should there be a distinction between public and private documents?

The Law Commission approach to forgery does not distinguish between classes of documents. The virtue of this approach is its simplicity and the avoidance of unnecessary distinctions between various forms of criminal conduct; these are objectives of the *Model Criminal Code*. Moreover, it does not automatically follow that forgery of public documents is more serious than forgery of private documents. Nor is it easy to say where the dividing line between public and private should be drawn.[139]

The Commonwealth, Queensland, Tasmanian and South Australian forgery provisions, continue to distinguish between categories of documents, in particular between public and private documents. Against this, there is undoubtedly special significance of certain documents, seals and signatures of high officials. The fact that, under Commonwealth and State law, judicial notice is taken of some official seals and signatures is a material consideration. It should be noted that the UK Law Commission recognised that the making and possession of a limited class of false seals and dies should be penalised.

Conclusion

Only two submissions commented on this proposal: the NSW magistrates and the Victoria Police both favoured it. The Committee has concluded that the general approach of avoiding distinctions between classes of documents in the proposed forgery provisions should be adopted and no special provision should be made for public documents. As discussed at length below, the distinction between public and private has always been hard to draw; it is becoming more so as public functions (including prisons) are privatised. Although there may be some concern about public documents, the special significance of any particular forged document - public or private can be reflected in the sentence imposed on the convicted person, always keeping in mind that forgery is essentially a preparatory offence.

139 See too the discussion below in relation to bribery.

Definition - false document

19.2 (1) For the purposes of this Part, a document is false if, and only if, the document purports:

(a) to have been made in the form in which it is made by a person who did not in fact make it in that form; or

(b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or

(c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or

(d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or

(e) to have been altered in any respect by a person who did not in fact alter it in that respect; or

(f) to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or

(g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or

(h) to have been made or altered by an existing person who did not in fact exist.

(2) For the purposes of this Part, a person is to be treated as making a false document if the person alters a document so as to make it false within the meaning of this section (whether or not it is false in some other respect apart from that alteration).

(3) For the purposes of the application of this section, a document that purports to be a true copy of another document is to be treated as if it were the original document.

19.2 - False document

The definition of false document has already been dealt with in the discussion about whether the offence of forgery should be abolished. As noted, a number of the sub-paragraphs of the definition of false document appear to be broader than the common law criterion of whether the document tells a lie about itself. It has been suggested that the use of the word "purports" in the preamble to the definition picks up the old meaning but whether this would be followed in Australia in the face of the terms used in the statutory definition must be doubted.[140] On their face, a number of the sub-paragraphs of the statutory definition appear to catch false statements in documents which do not go to the character of the document. Nevertheless, MCCOC has adopted the *Forgery Act* definition with two exceptions. The first concerns alterations. The *Forgery Act* applies to *any* alteration; s19.1(2) restricts this to the alterations listed in s19.1. This appears to have been the original intention. The second concerns copies.

-Copies

Copies generally fall within the definition of "document" in s19.1(1)(a). For a copy to be a "*false* document", it has to fall within one of the definitions in s19.2(1)(a)-(h) or s19.2(2): it has to *purport* to have been made in that form by a person who did not make it in that form, and so on. Take the example of a defendant who alters the form of the school principal's original draft letter on plain paper by copying it onto letterhead so that it appears to be the final copy. Where the copy appears to be the original, the copy is a *false* document because it *purports* to have been made in that final form by the principal when that was not the case (s19.1(1)(a)). The point is that the copy has false authenticity. It *purports* to have been made in that form by someone else, when that is not true. This is the statutory translation of the common law concept of a document which tells a lie about itself. The document purports to be something which it is not.

There is a more complex problem in the unusual situation where the document is obviously a copy, for example, because it has lines or other marks of a photocopier on it, or it is stamped copy, or the defendant tells the victim that the defendant will copy the document. To continue the previous example, say the defendant tells the victim that he or she will provide a copy of the school principal's letter and the copy is in fact stamped "Copied by the defendant". The copy is on letterhead when the principal had only prepared a draft on plain paper. Now the copy itself does not *purport* to be the principal's document. The *copy* itself purports to have been made in that form by the defendant and in fact the copy was made in that form by the defendant. The deception is that it purports to be a true copy of the original when in fact the original is not in that form.

140 See Archbold, *Pleading, Evidence and Practice in Criminal Cases* 43rd ed, 19-304.

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To prevent the argument that the copy *is* the defendant's document, that it purports to be the defendant's document and therefore does not tell a lie about itself, s19.2(3) provides that if the copy purports to be a true copy of the principal's letter, the copy will be treated as if it were the principal's letter. Thus, if the copy is false within the meaning s19.1(1) or (2), it will be a false document. In the example, the copy purports to be a true copy of the principal's letter. Therefore, it will be treated as if it were the original letter. The question is whether the principal wrote the original in this form (s19.1(1)(a)). The answer is that the principal did not put his or her letter in that form: the original letter was not on letterhead. Therefore, the copy is a false document. The same analysis will flow if the defendant alters the original and then makes a copy of it. The copy is still a false document because it is deemed to be the original and the original was not made in that form.

The Commonwealth DPP pointed out that the copy provision in s312.1.9 of DP2 made copies false documents if they differed in *any* way from the original and that this was inconsistent with the general approach of s19.2 and the position with respect to alterations(ss(2)) of documents which have to be alterations within the meaning of s19.1. The new draft cures that problem by simply deeming the copy to be the original author's document. It is then necessary to show that it is false in one of the ways set out in s19.1.

Conclusion

MCCOC concludes that the statutory "false document" definition of a false document is clearer and more practical than the old common law definition based on the distinction between a document containing a lie and a document which tells a lie about itself.

Forgery - making false document

19.3 A person who makes a false document with the intention that the person or another will dishonestly use it:

(a) to induce some person to accept it as genuine; and

(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 7 years and 6 months.

Fault elements

19.3 - 19.5 - Prejudice or dishonesty?

At common law, the fault elements for forgery are that the defendant must intend to falsify the document and intend to defraud someone else by getting him or her to accept the document as genuine.[141] The essence of the fault element for forgery is an intent to defraud. South Australia continues to apply the common law in this respect. The WA and Tasmanian Criminal Codes also employ intent to defraud as the mental element in forgery. The difficult history of the meaning of this and the cognate term "fraudulently" has been dealt with earlier in this Report in relation to the concept of dishonesty.[142]

The other jurisdictions have moved away from intent to defraud in varying degrees. In Queensland, the new Code has opted for dishonestly intending to gain a benefit or cause a detriment. The existing Code in that State requires knowledge that the document is false and intent that it may in any way be used or acted upon as genuine to the prejudice of any person, or with intent that any person may, in the belief that it is genuine, be induced to do or refrain from doing any act. The second part of this test (inducing another to do or refrain from *any* act) appears to be much broader than the common law. Under the NT *Criminal Code*, the fault element of forgery is acting in order to obtain a benefit for the defendant or another, or to cause another person to act to his, her or another's prejudice, or to induce another person to do or refrain from doing an act. This test also appears to be broader than the common law in that it speaks of *benefit to the defendant* or prejudice to the victim. The Commonwealth *Crimes Act* requires intent that the forged article may be used, acted on or accepted as genuine, to the prejudice of the Commonwealth or of any State or person, or with the intent that the Commonwealth or any State or person may, in the belief that it is genuine, be induced to do or refrain from doing any act.[143]

The UK Law Commission's starting point was the then existing UK law: if the document was made in order that it might be used as genuine and with intent to defraud (in relation to documents of a private nature) and with intent to defraud or deceive (in relation to documents of a public nature). It then went on to recommend that "the mental element of the offence of forgery should be an intention that the false document shall be used with the intention of inducing someone to accept it as genuine and, by reason of that, to do or refrain from doing some act to the prejudice of the person or of any other person." Prejudice is defined in essence as something which:

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141 Lanham et al, 184-94.

142 South Australia: Part 6 of the *Criminal Law Consolidation Act* 1935. It is not necessary to prove intent to defraud a particular person, s212(4). See too s473 *Criminal Code* (WA); and s278 Criminal Code (Tas). On the term "fraudulently" and cognate terms, see the discussion of dishonesty above.

143 Qld: s486; Qld (New): s182; NT: s258; Cth: s63.

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(a) will result in loss of money or property by the victim,

(b) will give the defendant an opportunity to earn remuneration or greater remuneration, or

(c) will induce an act or omission in connection with the performance of the victim's duty.

This recommendation has been acted on not only in the UK but in NSW, Victoria and ACT.[144]

Current reform proposals have not taken this issue much further. The Gibbs Committee, emphasising the limited application of Commonwealth provisions, thought it reasonable to provide for an intention that the Commonwealth, a State or a person may, in the belief that the document is genuine, be induced to do or refrain from doing any act and thought it unnecessary that there be a definition of "prejudice". The Murray Report in Western Australia recommended "intent to defraud" as the basic fault element for forgery, a term used in a number of other offences in the WA Code. The O'Regan Report followed the Murray Report in recommending the use of "intent to defraud" but advocated a statutory definition: an intent to cause pecuniary or other detriment to another. The English Draft Code simply adopts the provisions of the UK *Forgery Act*. The NZ draft *Crimes Bill*, distinguished between forgery with intention to use a document dishonestly to obtain any property, privilege, benefit, service pecuniary advantage or valuable consideration (which would carry a penalty of 10 years imprisonment) and a lesser offence of forgery with intent that it should be used or acted upon as genuine (which would carry a penalty of three years imprisonment).[145]

-Should "intent to prejudice" remain the key fault element for forgery?

The Law Commission's attempt to codify the common law of intent to defraud in its definition of prejudice is complex and arguably too narrow. The complexity can be seen in the definition contained in the jurisdictions which have adopted the Law Commission's recommendation:.

> An act or omission is to a person's prejudice if, and only if, it is one that, if it occurs:
>
> (a) will result:
>
> (i) in the person's temporary or permanent loss of property;
>
> (ii) in the person's being deprived of an opportunity to earn remuneration or greater remuneration; or

144 See Law Com No.55, paras 28 and 37. For the definition of prejudice, UK: s10 *Forgery and Counterfeiting Act* 1981; NSW: s305; Vic: s83A(8)-(10); ACT: s135B.

145 Gibbs, para 22.7. Murray, 309-14. O'Regan, 243 and s223 and s1. See s203-211 *Crimes Bill* 1989 (NZ).

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(iii) in the person's being deprived of an opportunity to obtain a financial advantage otherwise than by way of remuneration;

(b) will result in any person being given an opportunity:

(i) to earn remuneration or greater remuneration from the first-mentioned person; or

(ii) to obtain a financial advantage from the first-mentioned person otherwise than by way of remuneration; or

(c) will be the result of the person's having accepted a false document as genuine, or a copy of a false document as a copy of a genuine one, in connection with the person's performance of a duty.[146]

"Prejudice" extends beyond the normal meaning of detriment to another to include circumstances where the forger *gains* remuneration or a financial advantage from the victim, and to cases where the forgery procures *any* act from a person in connection with the performance of that person's duty .

These definitions of prejudice are complex and inconsistent with the *Theft Act* (UK) adoption of the fault element of dishonesty. For example, the *Theft Act* (UK) adopted dishonesty instead of intent to defraud for the offence of false accounting, a cognate offence to forgery. The fault element for that offence refers to a person who acts:

> dishonestly with a view to gain for himself, herself or another or with intent to cause loss to another.

This approach is very similar to the New Zealand *Crimes Bill*.

In DP2, MCCOC outlined the advantages of substituting "dishonestly with a view to obtaining a gain or causing a loss" for "intent to prejudice":

- it is consistent with the theft and fraud provisions in that it employs the concept of dishonesty as the substitute for the common law concepts of "fraudulently" and "intent to defraud";
- it avoids the complexity and inadequacy of the definition of prejudice;
- it allows for cases where a there may be no dishonesty (eg claim of right: where a person uses a false document to regain property

146 Vic: s83A(8).

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which he or she believes she is legally entitled to, or is not dishonest in some other respect)[147];

- it clearly includes an intent to gain by the defendant rather than simply an intent to cause a loss to the victim. A person who uses a false document to obtain a gain for himself merits punishment just as much as someone who intends to cause loss to another;
- chapter 3 of the Model Criminal Code already has established definitions of "gain" and "loss" in s14.3 taken from the *Theft Act* and those terms are used not only in false accounting but also in blackmail.

Despite these advantages, the Law Commission rejected the dishonesty approach on the basis that they "were dealing with the more specific concept of intention to prejudice by the use of a false instrument as if it were genuine, and we do not think that the addition of a further qualification of "dishonestly" is either necessary or helpful."[148] The Law Commission's recommended approach not only has the advantage of being close to the common law but it has been adopted in NSW, Victoria and the ACT and is close to the definition used in other jurisdictions. In DP2, the Committee recommended retention of the UK approach but invited submissions on the alternative dishonesty approach. The arguments for and against the "dishonesty" approach have been canvassed at length earlier in this Report elsewhere in relation to theft and fraud; similar arguments apply both to forgery and to bribery and secret commissions.

A number of submissions, particularly those from Western Australia, commented on the complexity of the UK provision and contrasted it with s473 of the WA Code. The Victorian, NSW and ACT consultation meetings favoured the simplification of the offence to dishonest intent to gain or cause loss or to influence the exercise of a public duty. This is consistent with the approach taken in blackmail. In particular, Judge Mullaly of the Victorian County Court pointed out that forgery would often be charged together with dishonestly obtaining property or a financial benefit by deception. The task of directing the jury in such cases would be much simpler if dishonesty was the fault element for both offences. MCCOC accepts the force of these submissions. Sections 19.4 - 19.5 adopt the dishonesty approach.

147 It has been held in England that a person may commit forgery even though the person is not acting dishonestly: *Campbell* (1985) 80 Crim App R 47 and the discussion in Smith and Hogan, *Criminal Law* 6th ed, 658-660. The Ausralian jurisdictions which adopted the UK Act did not enact the qualification in the UK legislation that it should not be to a person's prejudice to get the person to act according to his or her duty (for example, to use a false letter to get a tardy public servant to process a licence application). The dishonesty approach would accommodate this issue.

148 Law Com 55, para 35.

Code

-Restriction to economic gain and loss?

There is an additional issue of whether the intent in forgery (and blackmail) should be confined to economic prejudice. Under present law there is a question whether intent to defraud for the purpose of forgery extends beyond economic loss; the balance of authority does not restrict it to economic loss and extends it at least to cases where a public official refrained from doing an act pursuant to his duty which he would have done had he known of the forgery. This did not cause him any economic prejudice but the House of Lords found that this fell within the meaning of an intent to defraud.[149] Certainly the definitions of gain and loss in the *Theft Act* definition (see 14.3) are limited to money or other property.

The Committee considered the hypothetical case of a woman who forges a letter to a wife. The letter purports to have been written by another woman and says that the husband had had an affair with her. In fact, the other woman did not write the letter. The letter causes the wife to leave her husband. The example raises the question of whether an intention to cause serious non-economic loss or to obtain a non-pecuniary benefit should fall within the ambit of forgery. Despite the obvious harm done in a case such as the one in the example, this would considerably broaden the ambit of both forgery and blackmail. Such a provision would be necessarily drafted in broad terms - probably simply using the words "serious non-economic loss". Some submissions favoured this approach but others, including the WA police at the WA consultation opposed such wide-ranging offences on resource and priority grounds. All the other consultation meetings favoured the restriction to economic gain or loss.

MCCOC has extended economic gain or loss to include the intent to influence the exercise of a public duty. This is consistent with the codification of intent to defraud in blackmail and the interpretation of the same phrase in the case law. The *Forgery Act* is broader in that it applies to any duty. This is too vague and has not been adopted. [150]

149 See *Wellham v DPP* [1961] AC 103 and see the discussion in Lanham et al, 184-190 and 263-6.
150 See footnote 144 above.

Using false document

19.4 A person who dishonestly uses a false document, knowing that it is false, with the intention of:

(a) inducing some person to accept it as genuine; and

(b) by reason of so accepting it, obtaining a gain or causing a loss or influencing the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.4 - Using a false document

The fault element in the offence of *using* a false document is slightly different from the fault element for making a false document. It is implicit in making a false document that the person who falsifies the document knows that it is false. However, a person may use a false document without knowing that it is false. That leaves a question about whether anything less than knowledge - in particular, belief - should suffice.[151] The UK Law Commission put the following view:

> There are three aspects of using a false document in respect of which it is necessary to consider a mental element, namely the act of using, the fact that the document is false, and the intent with which it is used. In relation to the act of using we think that the appropriate mental element is intention and that nothing less should suffice. Secondly in relation to the state of mind as to the falsity of the document it is clear that knowledge of this will impart responsibility: the question is whether anything less than knowledge will suffice. In their *Report on Theft and Related Offences* (Eighth Report, (1966) Conde 2977, paragraph 134) the Criminal Law Revision Committee recommended that in the offence of handling stolen property it should be sufficient for guilt that the defendant knew or believed the goods to be stolen. They said that it was a serious defect in the law that actual knowledge that the property was stolen had to be proved. In the offence of using a forged document there is not exactly the same need to extend knowledge to belief if only because the contention of lack of knowledge is not so likely to be advanced; nevertheless there will undoubtedly be cases where the evidence may well establish a belief in the falsity of the document used, and yet will not establish knowledge. Accordingly we recommend that knowledge or belief should be sufficient. In regard to the intent involved in the using of the document we think that this should be the same intent as that which we have recommended for the main offence of making the document, namely the intent to induce another to accept it as genuine and, by reason of that, to do or refrain from doing some act to his prejudice or to the prejudice of any other person.[152]

151 The old offence was "uttering" a false document, often defined by a series of expressions. Law Com. No.55 recommended that in place of the term "utters" the single expression "uses" should be used as this would do duty for all the other expressions included in the definition of "utters". This recommendation was implemented in the UK and in NSW, Victoria and ACT. The Commonwealth, the Northern Territory and the remaining States still use the expression "utters". Section 19.4 of the MCC and s181 of Qld (new) adopt the term "uses".

152 Para 50.

Code

Section 3 of the *Forgery and Counterfeiting Act* 1981 (UK) implements this recommendation. It provides:

> It is an offence for a person to use a document which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

NSW, Victoria and ACT did not follow the UK approach: they required knowledge and did not include belief. Thus, a person who used a genuine document which the person *believed* to be a forgery would not be guilty of forgery, but would be guilty of be guilty of an attempt under s11.1 of the *MCC*. The Gibbs Committee favoured the inclusion of "belief".[153]

In the remaining Australian jurisdictions, Queensland refers to a person knowingly and fraudulently uttering a false document; the new Queensland Criminal Code refers to 'dishonestly intending to gain a benefit of cause a detriment'; WA to a person who with intent to defraud utters a record knowing it to be forged; Tasmania refers to intent to defraud knowing the document to be forged; South Australia uttering with knowledge of the character of the thing uttered.[154]

Conclusion

MCCOC does not consider it necessary to provide for "belief" as an alternative to "knowledge" in the suggested provision. This follows the approach adopted in the three Australian jurisdictions that have otherwise adopted the UK Act. Apparently it has not caused difficulty in those jurisdictions. One submission criticised this approach. "Knowingly" will be interpreted as provided in s.5.3 of the *Criminal Code Act* 1995.

153 NSW: s300(2); Vic: s83A(2); ACTs135C(2). Gibbs paras 25.7 & 25.15.
154 Qld: s489; Qld (new) s180; WA: s473 and s1; Tas: s277; SA: s212(1).

Possession of false document

19.5 A person who has in his or her possession a false document, knowing that it is false, with the intention that the person or another will dishonestly use it:

(a) to induce some person to accept it as genuine; and

(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.5 - Possession of false documents

The UK Law Commission recommended that there be two offences of custody or control of a limited description of false documents. Each offence requires knowledge or belief that the document was false, but the more serious offence requires an intention that the false document be used as genuine while the less serious one consists of having custody or control without lawful authority or excuse. This recommendation was implemented by s5 of the *Forgery and Counterfeiting Act* 1981 (UK). However, the NSW, Victorian and ACT laws in regard to possession of forged documents are not limited to particular descriptions of documents. These laws make it an offence to have in custody or under control *any* forged document with knowledge of falsity and with intention to use it to induce another person to accept it as genuine and by reason of so accepting it, to do or not to do some act to that person's or to another person's prejudice. The person must know the document is false; belief will not suffice. Mere possession of a false document is not an offence. The laws of the remaining States and Territories do not deal with this matter.[155]

The Gibbs Committee recommended an approach similar to that taken in NSW, Victoria and the ACT

> The argument against a possession offence applicable to false documents generally - rather than to a limited class of documents as is the case in the UK legislation - is that possession of a forged document is in the nature of a preparatory offence. Under s11.1 of the *MCC*, to constitute attempt, the conduct must go beyond mere preparation. MCCOC believes that possession of a forged document coupled with the requisite intent demonstrates sufficient criminality to warrant making it an offence. However, the words custody or control used in the UK provision are unnecessary - the concept of possession includes custody and control.

Conclusion

The Committee concludes that an offence of possession of any forged document with knowledge of its falsity and with intention to use it to induce another person to accept it as genuine and by reason of so accepting it, to do or not do some act to that person's or to another person's prejudice should be enacted (see s19.5).

155 NSW: s302; Vic: s83A(5); ACT: s135D. See too Qld(New): s183(1)(b).

Making or possession of devices etc. for making false documents

19.6 (1) A person who makes, or has in his or her possession, any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, with the intention that the person or another person will use it to commit forgery, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

(2) A person who, without lawful excuse, makes or has in his or her possession any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

19.6 - Possession of a device designed for making of a false documents

The UK Law Commission recommended the creation of an offence of making or having in custody or under control a machine, implement, paper or other material specially designed or adapted for the making of a *limited class* of documents. The intent for the more serious offence is an intent to commit forgery or to enable another person to commit forgery (see s19.6(1)). The less serious offence merely proscribes possession of a device designed or adapted for the making of a false document without lawful excuse(s19.6(2)). By s13.3(3) of the *Criminal Code Act* 1995, the defendant will only bear an evidential burden in relation to a lawful excuse.

The laws enacted in Victoria and ACT did not restrict these offences to a limited class of documents. Section 19.6 follows this model except that the words "device, material or other thing" are substituted for the list "machine, implement, paper or other material". This is done for the sake of drafting and does not appear to alter the meaning of the offence, although the submission from the AFP and the Victorian Police urged the amendment to make it clear that the offence covered credit card blanks. These clearly would be covered.

Conclusion

Again, these are in the nature of preliminary offences but for reasons similar to those given in relation to possession of false documents, MCCOC concludes that their inclusion is justified.

Currency

It should be noted that the matter of making or uttering counterfeit money and prescribed securities is regulated by the *Crimes (Currency) Act* 1981 (Cth) to the exclusion of State law. As noted above, currency is a Commonwealth responsibility and appropriately dealt with outside the Code. Submissions agreed with this view. Securities are in a different category.

A prescribed security is defined (s.3) to mean:

> "any bond, debenture, stock, stock certificate, treasury bill or other like security, or any coupon, warrant or other document for the payment or money in respect of such a security, issued by the Commonwealth of Australia, by an authority of the Commonwealth of Australia or by, or with the authority of, the government of a country other than Australia."

Securities issued by a State or Territory are thus outside the ambit of the Commonwealth Act and may be regulated by State or Territory laws.

Consistent with the approach of not making special provision for classes of documents, MCCOC believes that the general forgery offence should be used for forged securities generally. The severity of the particular offence should be reflected in the penalty.

False accounting

19.7 A person who dishonestly, with the intention of obtaining a gain or causing a loss:

(a) destroys, defaces, conceals or falsifies any document made or required for any accounting purpose; or

(b) in furnishing information for any purpose, produces or makes use of any document made or required for any accounting purpose that to his or her knowledge is or may be misleading, false or deceptive in a material particular

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.7 - False accounting

All States and Territories - except Western Australia - have provided for the offence of false accounting. Western Australia covers this offence under the general offence of fraudulent falsification of records.[156] Section 19.7 of the *Model Criminal Code* follows the *Theft Act*(UK) provision which has been adopted in Victoria, the ACT and substantially by the NT.[157] As noted above, the *Theft Act* model has been adopted generally in this part of the *Model Criminal Code* and this offence is no exception.

Given that false statements in documents in general are not to be criminalised, and given the broader nature of the new forgery offence, there is a question of whether to retain State and Territory laws dealing with the other false document offences: dishonest falsification of accounts and dishonest suppression or destruction of certain classes of documents. These State and Territory Laws relate to strictly limited classes of documents.[158] They differ from forgery in two important respects: both have dishonesty as one of their fault elements and both apply to intent to gain *or* intent to cause loss.

Despite the wider definition of forgery, it is still essentially an offence about altering *other* people's documents. A person who authored a false account would not be covered. Despite the decision that in general it should not be an offence to make false statements in documents, given the central importance of accounts in the world of commerce, this offence should be retained. Section 19.7 does this.

Suppression of documents

The same cannot be said of the suppression of documents offence. The fault element for the offence is dishonesty with a view to gain for the defendant or another or to cause loss to another. The physical element of the offence is concerned with the destruction, defacement or concealing of valuable securities, wills, original documents filed in courts or government departments. There is a separate offence for procuring the execution of a valuable security. The offence is defined in s162 of the English Draft Code as follows:

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156 NSW: s158; Vic: s.83; Qld: ss.441,442; Qld (new) does not have this offence; Tas: s.264; NT: s.233, SA: s.178; ACT: s108.;WA: s424. In WA the offence covers "any record" defined as anything on which meaning can be conveyed in a visible form. This is effectively a falsification of documents offence.

157 Section 17 Theft *Act* (UK); Vic: s83; ACT: s108; NT: s233.

158 False accounts: NSW: s158, Vic: s83, Qld: s441; WA: s424(records), Tas: s264, SA: s178; NT: s.233 and ACT: s108. Suppression of documents: NSW: s158, Vic: s.86; Qld: s.441; Qld(New) does not have this offence; WA: s424(d); Tas: s.264; SA: s178(a); NT: s.235; ACT: s111. Note: the WA provisions apply to *all* "records". Note too that many of the jurisdictions have other false documents offences, notably in relation to officers of companies and in some cases to public documents (for example, see WA: s548). See s19.10 of the MCC.

Code

(1) A person is guilty of an offence if, dishonestly, with a view to gain for himself or another or intending to cause loss to another, he destroys, defaces or conceals -

(a) a valuable security; or

(b) a will or other testamentary document; or

(c) an original document of, or belonging to, or filed or deposited in, a court of justice or government department.

(2) In this section "valuable security" means any document -

(a) creating, transferring, surrendering or leasing a right to, in or over property; or

(b) authorising the payment of money or delivery of property; or

(c) evidencing the creation, transfer, surrender or release of a right to, in or over property, or the payment of money or delivery of property, or the satisfaction of an obligation.

The question is whether these documents are so significant that they warrant a special preliminary offence short of fraud or attempted fraud. It is not clear why documents lodged in government departments, for example, merit protection not afforded to other documents. Two submissions - one from the South Australian Police and one from the Department of Administrative Services disagreed with this approach. MCCOC believes that the general law of fraud, attempted fraud and forgery provide sufficient protection in this area and that a suppression of documents offence should not be included in the *Model Criminal Code*. The same arguments apply to the various other documents offences based on the nature of the document or some characteristics of the person. These offences should not be included in the *Model Criminal Code*.

Recommendation

The MCC should not include the offence of suppression of documents

Penalties

The penalty for forgery should be lower than for fraud because the offence is essentially preparatory: it does not require proof that any property or financial advantage was obtained. Where property or a financial advantage is obtained, the defendant can and should be charged with the appropriate fraud offence. The penalty ought to be set one level lower than for theft and fraud at 7.5 years. These penalties are provided in ss19.3-19.7. The offence of possessing forgery implements without lawful excuse is less serious because no intent to prejudice another has to be proved. The penalty for this offence is 2 years(s.19.6).

Code

PART 3.6 BRIBERY AND OTHER CORRUPT PRACTICES

Bribery

Corruption of public officials has been a subject of concern in Australia in recent years. The FitzGerald Report in Queensland, the WA Inc Royal Commission, and the establishment of the Independent Commission Against Corruption in NSW are some manifestations of this concern. In NSW, the resignation from Parliament of a former Minister and his subsequent appointment to a public service position led to an allegation that he had sought the position as the price of his resignation from Parliament from the then Premier who had political reasons for wanting him to resign. In Victoria in 1991, a threat by the then Opposition leader that upon election he would revoke the superannuation benefits of Government members who did not resign within a given period also led to allegations that this amounted to a bribe and to the introduction of a the *Crimes (Bribery of Members of Parliament and Public Officials) Bill* 1991 (Vic).[159] At the same time, the offer of money or other benefits to people in the private or semi-private sector - for example, the $2 million secret commission case involving Ian Johns and the Tricontinental Bank, described as the mother of all secret commissions - has also been a subject of serious concern. The offence of receiving a secret commission - where an agent dishonestly receives money or other benefits in order to depart from the duty owed to his or her principal - is essentially the private sector equivalent of bribery which - despite common usage - only applies to public officials.

The basic criminal offence in this area is bribery. Essentially, bribery is offering money or other benefits to public officials in order to induce them to depart from their public duty. At common law:

> Bribery is the receiving or offering of any undue reward by or to any person whatsoever ... in a public office in order to influence his behaviour in office and incline him to act contrary to the known rules of honesty and integrity.[160]

In New South Wales and Victoria, bribery remains a common law offence. The Code States, the ACT and the Commonwealth have broadly similar

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159 In this chapter, MCCOC is particularly indebted to a working paper by P Finn, "Abuse of Public Trust" (part of a project "Integrity in Government" conducted by Professor Finn of the Australian National University)("Finn") and New South Wales Cabinet Office and Attorney-General's Department, *Reform of the Criminal Law relating to Bribery and Corruption: Discussion Paper and Exposure Bill* (1992) ("the NSW Discussion Paper") and Australia, *Review of Commonwealth Criminal Law: Fourth Interim Report* (November 1990) ("Gibbs, Fourth Report"). See too Lanham et al, *Criminal Fraud* (1987). The case involving the NSW Minister was referred to the Independent Commission Against Corruption and eventually went to the Court of Appeal: *Greiner v Independent Commission Against Corruption* (1992) 28 NSLR 125. The Victorian case did not lead to any charges being laid; the Bill was introduced but did not proceed.

160 *Russell on Crime* 12th ed at p381.

Code

provisions. The Queensland provision is s87 of the *Criminal Code*:

> Any person who -
>
> (1) Being employed in the Public Service, or being the holder of any public office, and being charged with the performance of any duty by virtue of such employment or office, not being a duty touching the administration of justice, corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of any thing already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or
>
> (2) Corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for, any person employed in the Public Service, or being the holder of any public office, or to, upon, or for, any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed or holding such office;
>
> is guilty of a crime, and is liable to imprisonment for seven years, and to be fined at the discretion of the court.

The Queensland, Tasmania and the Northern Territory provisions include "corruptly" as a fault element but it is not present in the Western Australian, the ACT or Commonwealth provisions. In South Australia, bribery has been a statutory offence for many years and has recently been re-enacted in a new form. The South Australian Act uses the term "improperly" (specially defined) instead of "corruptly".[161] The statutory schemes commonly include separate provisions depending on the status of the public officer involved (eg member of Parliament, judge, other public official). Reports on these offences have generally suggested the amalgamation of these into one offence. For reasons advanced in relation to the other offences in this chapter, MCCOC agrees with this line of development.[162]

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161 Qld: s 87; (See Qld(New): s257-270); WA: s 82 (and see ch XIV in relation to bribery at elections); Tas: s 83; NT: s 77; SA: s 249; ACT: s14 Crimes *(Offences Against the Government) Act* 1989; Cth: ss73 & 73A - There is some doubt about whether these provisions subsume the common law.

162 Special offences for bribing MPs: Tas:s71-72; SA: S249; ACT: S15 *Crimes (Offences against the Government) Act* 1935; NT: ss59-60; WA: ss60-61; Qld: ss59-60; (Qld (New) s257-261 includes MPs with all other sorts of agents). Special offences for bribing judicial officers: WA: s121-123; Qld: s120-121; (see Qld(New): s262-264); sTas: s90-91; NT: s93-94; Cth: s32-33. Recent reports on bribery include: UK, *Report of the Royal Commission on Conduct in Public Life;* Cth, Review *of Commonwealth Criminal Law - Fourth Interim Report ("the Gibbs Report");* NSW, *Discussion Paper and Exposure Bill on the Reform of the Criminal Law - Bribery and Extortion* (1992).

Code

Extortion

The related offence of extortion applies to officials who corruptly use their office to demand money not due to them or more than is due to them. At common law extortion is : "the taking of money by any officer by colour of his office, either where none at all is due, or not so much is due, or it is not yet due". Some improper motive was required to constitute the offence or, at all events, intention to do the wrong actually done.[163]

The offence of extortion was abolished in England by the *Theft Act* 1968 (UK) on the recommendation of the English Criminal Law Revision Committee in its Report on *Theft and Related Offences*. No explanation was given in the Report for the abolition, but presumably this course was thought appropriate having regard to the general provisions of the new *Theft Act*, including section 21 dealing with unwarranted demands with menaces (blackmail). Victoria followed the same course in adopting the *Theft Act* model in 1973. Western Australia also does not have an equivalent to common law extortion (but the conduct is probably covered by s83(c)). NSW still has the common law offence. Queensland and the Northern Territory have an extortion provision limited to taking of rewards for the performance of their duties by persons employed in the public service; Tasmania has a somewhat broader offence of extortion. South Australia has recently enacted a statutory offence of extortion.[164]

Extortion substantially overlaps with the offences of blackmail and bribery. Extortion has an element of *coercion* on the part of the office holder which is not necessarily present in bribery; bribery tends to be consensual. Take the example of an official who threatens to withhold an entitlement unless money is paid. In such circumstances, the extortion amounts to blackmail (demanding money with menaces) and the broadened definition of menaces in s18.3(1) makes it clear that a person who uses his or her office as a means of obtaining money or property will be guilty of blackmail. Thus, the coercion aspect of extortion has been dealt with in the offence of blackmail.[165]

Non-coercive extortion - for example, the police officer who lets it be known in a general way to those on his or her beat that he or she should be provided with money or goods or the like - is essentially bribery in relation to the general exercise of duty. With the expansion of the common law offence of bribery from judges to all public officers, the rationale for a separate offence of extortion

163 See Co Litt 368 Rep 10; see also *Mason v. New South Wales* (1959)102 CLR 108, per Windeyer J, p139; *Shoppee v. Nathan & Co* [1892] 1 QB 245 Collings J. at p 252.

164 CLRC (Theft). WA: s397; Qld: s88; NT: s78; Tas: s84; SA: s252.

165 The offence of extortion proposed in the NSW Discussion Paper falls within the definition of blackmail in s18.1.

Code

has disappeared.[166] The common law offence of extortion has been abolished in England, Victoria and Western Australia. In the other Australian jurisdictions, it is in disuse. However, significant use has been made of the offence in the United States. The overlap with blackmail and bribery is confusing and unnecessary in view of the availability of the other offences to cover the behaviour that is potentially within the ambit of extortion. The new offence structure proposed for bribery and secret commissions covers the field that would have been covered by extortion. In view of this, MCCOC recommends against including a separate offence of extortion in the *Model Criminal Code*.

> Recommendation
>
> A separate offence of common law extortion should not be included in the Model Criminal Code

Secret Commissions

The offence of receiving a secret commission applies to an agent who corruptly takes a payment from a person as an inducement or reward for doing any act in relation to the principal's business. For example, a bank manager who corruptly received money from a customer of his or her bank as an inducement for giving the customer preferential treatment in approving a loan would be guilty of receiving a secret commission. The customer would commit the offence of giving a secret commission.

The secret commissions offences are essentially an attempt to create a bribery offence for corruption in the *private* sector. The common law did not have secret commissions offences. They are a product of the turn of the twentieth century scandals in Australia and England about the extent of corrupt behaviour in the private sector. The Commonwealth enacted the *Secret Commissions Act* 1905 following a report of a *Royal Commission on Corrupt Practices in the Dairy Industry*; similar but not identical legislation was enacted in all Australian States in the next few years. In 1906, the UK Parliament enacted the *Prevention of Corruption Act* 1906, broadly to the same effect.[167]

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166 See the NSW Discussion Paper, pp5-7, 16-17 and 38-40. It might be argued that the police officer who receives regular payments on the beat has not made a demand for the purpose of blackmail. However, the demand is implicit in the circumstances. In any event, a "taking by colour of office" implies a form of demand. In relation to bribery, it is clear in such a case that the police officer has "received" the bribe even if it were found that he or she had not "asked" for one (see s223).

167 The origin of this legislation is the UK *Public Bodies Corrupt Practices Act* 1889. See South Australian Attorney-General's Department, *Secret Commissions: Discussion Paper* 1993. The current provisions are: NSW: Part 4A; Vic: ss 175 - 186;SA: *Secret Commissions Prohibition Act* 1920; Qld: Chapter XLIIA; (Qld (New): s257.- secret commissions are now covered by bribery); WA: Chapter LV; Tas: s 266; NT: Part VII Division 5; Cth: *Secret Commissions Act* 1905.

Code

The *Secret Commissions Acts* provisions overlap the offence of bribery in the sense that an employee in the public sector could be convicted of both receiving a bribe *and* receiving a secret commission. But there are two essential points of difference. Bribery only applies to public officials; secret commissions extend to corruption of non-officials described as agents; in several of the State Acts this term has, by later amendments, been given an increasingly wide definition.[168]

The second point of difference is that, in bribery, the offer or receipt of a bribe must ordinarily be made *before* the conduct as an *inducement*; secret commissions apply to inducements *and rewards* for acts previously done without the need for an offer or agreement before the doing of the act. Proof of secret commissions is made easier by the statutory *presumption* that an agent who has received money from the customer of the principal without the consent of the principal has solicited a secret commission.[169]

Should the distinction between public and private sector corruption remain?

The most fundamental question in this area of the criminal law is whether the distinction between public and private sector corruption should be retained. Put differently, should bribery continue to be confined to public officials?

-Arguments for retaining the distinction

Traditionally bribery has been confined to public officials; indeed it originally applied only to judges. This is because integrity in government is of such overwhelming importance to the overall functioning of society. The bribery of an official or a member of Parliament involves such a danger to the political system or public administration that it should be dealt with as a very serious offence which ought to be kept separate from laws dealing with conduct in the private sector. This is the approach generally adopted in common law jurisdictions. To extend the offence of bribery to the private sector would debase the currency of the offence and its symbolic importance in underpinning the importance the community rightly attaches to the need to be able to have confidence in government. No other jurisdiction has extended or proposed to extend bribery into the private sector.

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168 For instance "agent" is defined in s.175 of the *Crimes Act* 1958 (Vic) as:
"agent" includes any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any corporation or other person whether as agent partner co-owner clerk servant employer banker broker auctioneer architect clerk of works engineer barrister and solicitor surveyor buyer salesman foreman trustee executor administrator liquidator trustee within the meaning of any Act relating to bankruptcy receiver director manager or other officer or member of committee or governing body of any corporation club partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or otherwise and a person serving under the Crown.

169 Lanham et al, 214,222-3. But note that the Codes extend bribery to payments for things already done. See: Qld: s87(1): Qld (New) s258; WA: s1; Tas: s83; NT: s77.

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The correlative argument is that the special duty and liability imposed on public officials should not be imposed on agents in the private sector. Agents in the private sector cannot be said to have a duty to the public in general and that is reflected in the fact that bribery has never been extended to them.

Applying bribery to the private sector would be a significant extension of the criminal law. It would mean, for example, that a member of a public interest group who offered money in order to obtain information from an employee of a company suspected of pollution could be charged with offering a bribe. There is the possibility that bribery could be used in the industrial setting against unionists demanding benefits from their employer or a third party . The problems of corruption are serious but do not warrant such an expansion of the offence of bribery.

-Arguments against retaining the distinction

The distinction between the public and the private sector has never been clear and, as an increasing number of functions which have traditionally been performed by the public sector are being privatised, making the distinction between public and private increasingly difficult to draw. Given that the distinction between the functions to be privatised are based primarily on economic criteria, linking the offence of bribery to functions which *happen* to be performed in the public sector for the time being is arbitrary. For example, whether a corrupt payment to a prison official constitutes bribery will depend on whether the official works in a prison that is privatised. In a state like Queensland where some prisons are private and some public, the arbitrariness of the public/private distinction is stark.

One answer to this argument is to say that the offence applies to anyone performing a *public function* - anything in which the public is interested - rather than whether the person is employed by the public service.[170] There is some force in this but it raises a further question about which functions the public is interested in. The public has an interest in a variety of people who might be taking corrupt payments, from the jockeys who ride in the horse races on which the public wagers to the employees of companies in which the public invests.

Confining bribery to the public sector assumes that public sector corruption does more harm to the community than private sector corruption. That assumption is questionable. The secret commissions paid to Johns in the Tricontinental Bank case amounted to $2 million. The corrupting effect of a secret commission of that amount on confidence in the *general* commerce and finances of the community were very serious and more harmful than many instances of bribery in the public sector. Yet the maximum penalty in Victoria for a secret commission at the time of the *Johns* case was 2 years. It is now 10 years. The public needs to be able to have confidence in the integrity of both

170 See Lanham et al, *op cit*, 202-4.

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the public and the private sector. It should not be statutorily presumed that corrupt payments in the public sector do more harm than corrupt payments in the private sector. The amount of damage in a particular case should be a question for sentencing rather than the subject of a separate offence.

The labels used in the criminal law should reflect common usage. Both in common parlance and in reported cases, the term bribery is used to describe corrupt payments in general. It is not restricted to the public sector. The controversy surrounding allegations that Salim Malik offered money to members of the Australian Test team to get them to play below their best was universally spoken of as "bribery". In strict legal terms, the allegations were about offering secret commissions. The controversy illustrates the common usage and the communicative power of the term "bribery".

The objection that bribery may be used against public interest groups is misleading. The person who offered money to an employee for information on a company suspected of polluting would currently commit the offence of offering a secret commission. This offence now carries maximum sentences of 7 and 10 years in some jurisdictions (see below), and has a reverse onus of proof. Nor is there any realistic possibility of bribery being used in industrial disputes. Large numbers of public servants are unionists and are already subject to the law of bribery, but the offence is not deployed against them because their claims are not dishonest. Rationalisation of the main corruption offences - bribery and secret commissions - provides the opportunity to deal with corrupt payments on an equal footing.

Bribery should apply to both the public and private sector. There should be two levels of offences as set out in ss20.2-20.5: the more serious offence - bribery - should apply to cases where a payment is dishonestly made *in advance* in order to induce an agent to do or fail to do something in relation to his or her duty and should carry a penalty of 10 years. The less serious offence - which would not have such stringent requirements of proof - corrupt benefits (ss20.4-20.5) - should extend to dishonest payments which tend to influence the performance of a duty. There is no need to prove an advance payment by way of inducement: a reward after the desired act has been done will suffice. The Gibbs Committee recommended that this distinction be maintained and reflected in the lower penalty provided for the equivalent of the secret commissions offences. Professor Finn agreed with this approach. The maximum penalty for the less serious offence is 5 years.[171]

171 Gibbs *Fourth Report pp*244-245; Finn p61. Note that the Code States already include rewards under the main offence of bribery. The maximum penalty is 7 years. MCCOC believes that the inducement is the more serious offence.

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Conclusion

Submissions on this issue favoured the extension to the private sector. Although some submissions - such as the submission from the NSW magistracy - expressed doubt about whether the proposal would gain public acceptance, the majority of submissions found the arguments for the extension persuasive. Harding was representative of the view that bribery has no necessary connection with the public sector, while others felt that the same standards should apply to both public and private sector. On the other hand, Geoffrey Miller QC argued that the existing secret commissions provisions adequately represent the criminality of corrupt private sector payments.

MCCOC finds the arguments for applying bribery to the private sector persuasive. Sections 20.2 to s20.5 apply to *any* agent - defined in s20.1 to include the same categories of people as currently covered by the secret commissions offences plus public officials (also defined) and members of Parliament.

PART 3.6 - BRIBERY AND OTHER CORRUPT PRACTICES

Division 20

Definitions

20.1 (1) In this Part:

"agent" includes the following:

(a) A person who acts on behalf of another person with that other person's actual or implied authority (in which case the other person is the principal).

(b) A public official (in which case the Government or Government agency of or for which the official acts is the principal).

(c) An employee (in which case the employer is the principal).

(d) A legal practitioner acting on behalf of a client (in which case the client is the principal).

(e) A partner (in which case the partnership is the principal).

(f) An officer of a corporation or other organisation, whether or not employed by it (in which case the corporation or other organisation is the principal).

(g) A consultant to any person (in which case that person is the principal).

"benefit" includes any advantage and is not limited to property;

"function" of an agent includes any power, authority or duty of the agent or any function that the agent holds himself or herself out as having;

"exercise" a function includes perform a duty;

"public official" means any official having public official functions or acting in a public official capacity, and includes the following:

(a) A member of Parliament or of a local government authority.

(b) A Minister of the Crown.

(c) A judicial officer.

(d) A police officer.

(e) A person appointed by the Government or a Government agency to a statutory or other office.

20.2 - Bribery

The proposed offence of bribery has the following elements:

Fault elements

- dishonesty;
- intent to give a benefit to an agent;
- intent that the benefit influence or affect the duty of an agent, or that the agent will do or omit to do something, or that the agent will get the principal to do something.

Physical elements

- giving, offering or promising;
- a benefit;
- to an agent.

Receiving a bribe is the obverse of the offence of giving a bribe.

Fault elements

14.2 - Dishonesty

The essence of the common law fault elements for bribery was an intent to incline an official to perform his or her duty in a way that is "contrary to the known rules of honesty and integrity." The original Griffiths Codes used the term "corruptly" to capture this meaning in the *general* offence of bribery but the amended offence in WA has omitted the word. The term is not used in a number of the Code offences relating to a member of Parliament, but it is used in the WA offences. The Commonwealth *Crimes Act* and the ACT *Crimes (Offences Against the Government) Act 1981* do not use either term. In South Australia, the new statutory provision uses the term "improperly". The new Queensland Code uses dishonesty.[172]

In many cases, it will be clear that a benefit given to a public official in order to influence his or her duty to do or refrain from doing an act will constitute a bribe. However, unless some additional fault element is specified, payment of the official's salary would constitute bribery because it is a benefit given in order to influence the official's duty, as would an official's demand for salary or

172 See footnotes 161 and 162.

(f) A person employed by the Government or a Government agency (including a local government authority).

(2) For the purposes of this Part, a person is an agent or principal if the person is, or has been or intends to be, an agent or principal.

(3) For the purposes of this Part, the provision of a benefit may be dishonest notwithstanding that the provision of the benefit is customary in any trade, business, profession or calling.

20.2 (1) Giving a bribe. A person who dishonestly provides, or offers or promises to provide, a benefit to any agent or other person with the intention that the agent will provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) Receiving a bribe. An agent who dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another person with the intention of providing a favour is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(3) For the purposes of this section, a favour is:

(a) the agent being influenced or affected in the exercise of the agent's functions as such an agent; or

(b) the agent doing or not doing something as such an agent or because of his or her position as such an agent; or

(c) the agent causing or influencing his or her principal or other agents of the principal to do or not to do something.

a salary increase as a condition of doing his or her job. There are also very difficult questions in this area about the legitimate ambit of politics. Offering a parliamentarian a benefit to vote in a certain way seems a clear case of bribery.[173] But what of the Victorian case of the threats to the superannuation entitlements of government backbenchers, referred to above, or a Prime Minister, or Premier who offers a Minister an overseas posting in order to secure a political advantage, or a party leader who offers promotion to a backbencher, but only if he or she votes in accordance with party policy on a particular issue? And what of the candidate who promises to support certain policies or interest groups if elected? What of large campaign contributions?

The US *Model Penal Code* recognised that special considerations apply to the political process and that "log rolling", while sometimes offensive and occasionally subversive of good government, is frequently an unavoidable technique for bringing persons of divergent views into accord on a common plan of action. This is true even in the more tightly disciplined party systems at work in Australia. Under the US *Model Penal Code*, it would be an offence to offer any pecuniary benefit as consideration for the recipient's decision or vote, but "benefit" would exclude an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.[174]

Professor Finn urges that a distinction be drawn between offences that apply to non-elected officials and those that apply to elected officials:

> Both arrangements between members of the public and a member of Parliament (for example, campaign contributions) and between Members of Parliament and a ministerial colleague (for example, to support a minority government or a particular measure) may have as their object the influencing of the actions of the member in his or her parliamentary or ministerial capacity and may result in the receipt of benefits either by the member or by third parties. Yet such arrangements may reflect no more than the compromises or practices which at a given time we are prepared to accept as tolerable or even necessary if our democratic institutions and processes are to be allowed to realise their public purposes. This is not to say that such arrangements may not in some circumstances be corrupt and condemnable. What is suggested is that distinctive criteria need to be adopted to calibrate the propriety or otherwise

173 Yet the matter is not as clear as it seems. In England, common law bribery of an MP is a matter to be dealt with as a matter of parliamentary privilege rather than a criminal offence. In Australia, the common law covers MPs: see *White* (1875) 13 SCR (NSW)(L) 332. The Bowen Committee, *Report on Public Duty and Private Interest* 1978 found that s73 of the *Crimes Act (Cth)* did not apply to MPs. Subsequently, s73A was inserted to cover this gap. Each of the Code States has a separate provision for MPs: Qld: ss59-60; WA: 60-61; Tas: ss71-72; NT: ss59-60.

174 Article 240.1 and Commentary p.10.

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> of benefit conferring dealings involving officials elected to representative law making bodies. Simply by way of example it should be noted that in the United States - which now has an extensive case law and literature on this matter - the Supreme Court has recently held in *McCormick v US* (a campaign contributions case) that, for the purposes of *Hobbs Act* extortion, the conduct of elected officials is to be judged by criteria different from that applied to non-elected officials.[175]

These are the sorts of difficult questions which make the fault element in bribery a crucial issue. There appear to be three main options:

- to omit a fault element like "corruptly" or "dishonestly";
- to rely on the common law meaning of "corruptly" which is based on behaviour which is "contrary to the known rules of honesty and integrity";
- to have a more elaborate and specific definition of "corruptly".

The existing bribery provisions in the Codes (except WA) rely on the term "corruptly" but do not define it. The new Queensland Code uses "dishonesty" (s259). Interestingly in view of the special considerations attaching to politicians, the special provisions dealing with Parliamentarians omit the term! The Commonwealth and ACT general bribery provisions and the new general bribery provision in the Western Australian Code also omit any reference to the term "corruptly". The Western Australian provision (s82) is as follows:

> Any public officer who obtains, or who seeks or agrees to receive, a bribe, and any person who gives, or who offers or promises to give, a bribe to a public officer, is guilty of a crime and is liable to imprisonment for 7 years.

"Bribe" is defined as a benefit to an official in respect of an act done in relation to his or her duty. Similarly, the Commonwealth *Crimes Act* provision (s73) inserted in 1926, does not include the term "corruptly. This replaced an earlier provision which did use "corruptly"; the reason for the omission is not recorded in the debates. Some argue that public officials occupy a special position of trust and must be held to a very strict standard and that this standard should not be seen to be relaxed in any way. However, as noted above, there is a fundamental problem with a definition of bribery which catches the payment of salary.

MCCOC agrees with the conclusion reached in the NSW Discussion Paper that such provisions which either do not have a fault element or leave the fault element to be implied are unsatisfactory in a criminal offence as serious as

175 Finn p52.

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bribery. Fundamentally, such definitions fail to distinguish between bribes and legitimate benefits. It is also inconsistent with the emphasis on fault elements in chapter 2 of the *MCC.* [176]

The core of the offence of bribery is the making or offering of a payment with an intent to incline a person in public office to depart from his or her duty. Nevertheless, the statutory expressions of the offence in Australia do not spell out this requirement (although it is arguable that this is implied by the word "corruptly" where it appears in the Code provisions). The Commonwealth and ACT provisions, for instance, make it an offence for an officer to ask for a benefit on an understanding that the exercise by him of his duty or authority will, in any manner, be *influenced or affected*, not corrupted. The justification for this approach is that public confidence in the administration of justice and government requires that there should be no suspicion that the conduct or decision was influenced by the bribe.[177] However, as the NSW Discussion Paper points out, the essence of the offence is not *mere payment* but actual disloyalty or dishonesty. The "need to maintain trust and confidence in the system of public administration must be balanced against the potential injustice to individuals of imposing penalties on them - and perhaps lengthy terms of imprisonment - for conduct which by prevailing ethical standards is not intrinsically corrupt."

It would be possible to draw up a list excepting some benefits such as salary from the definition of bribery. But would the offer of a job outside Parliament or upon resignation from the public service be included? The answer to these questions would depend on the circumstances and ultimately an assessment of the legitimacy of the benefit. The range and complexity of possible situations would defeat an attempt to deal with the problem by a list of exemptions. Some general criterion is needed.

The New South Wales Discussion Paper proposes that the essential fault element of bribery should be that the offerer of the bribe believed that the official was not (or was not likely to be) authorised to provide the favour sought in the course of carrying out public official functions. This is intended to capture the "elusive" element of corruption. But as the Discussion Paper itself points out, what is authorised by law may itself prove elusive. The authority of the official is subject to a further definition (s343H) requiring proof about whether the defendant believes the giving of the favour was a criminal offence, a civil wrong or other illegal act. Even this may not equate with dishonesty or corruption. The form and complexity of the fault elements in the New South Wales Bill risks the sorts of criticisms made by the New South Wales Court of Appeal in

176 *For example, WA: s82; the NSW Discussion Paper: 19-20, 23. See too CLOC (now MCCOC), Report: Chapter 2 General Principles of Criminal Responsibility* 1992, pp23-25.

177 See *Allen* (1992) 62 A Crim R 251 at p255. On the Commonwealth provision see *Williams v R* (1979) 23 ALR 369; Gibbs Fourth Report pp176-185. See too Finn.

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relation to the definition of corruption in ss8 and 9 of the *Independent Commission Against Corruption Act* 1988.[178]

The term "corruptly" seems to be the closest the existing law has come to defining the fault element for bribery satisfactorily. But the leading cases on the meaning of the term are unclear. Like dishonesty, some judges have thought that the word "is a simple English adverb" and should be left to the jury; those judges did not think corruptly was a synonym for dishonestly. On the other hand, the Chief Justice of South Australia thought that :

> ... a man who acts corruptly within the meaning of that section necessarily acts dishonestly. Of course, I use the word "dishonestly" to mean dishonesty according to normally received standards of honest conduct.[179]

On this view, all acts of corruption are dishonest. In dealing with the term "corruptly" in the bribery provision of the Queensland Code (s87) The High Court in *Herscu* described the duty of public officials as follows:

> It was, we think, within the scope of that duty for the Minister, in his capacity as Minister, to seek to influence an individual authority to review a planning decision. Such a discretion was a necessary accompaniment of the more drastic powers which the Minister had under the legislation in relation to local authorities. In the exercise of his duty the Minister was under an obligation to act *honestly* and it was for the purpose of ensuring that a public official should so act, and not to sacrifice duty for gain, that the offences found in s87 were created (emphasis added).[180]

The new South Australian definition of bribery employs the term "improperly" defined to mean: "knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers."[181]

Similar arguments arise in relation to secret commissions where the word "corruptly" is used in the standard provisions. The arguments parallel the

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178 NSW Discussion Paper, p20 and s343F(c) of the Discussion Paper Bill. For the criticisms see, *Greiner v Independent Commission Against Corruption* (1992) NSWLR 125 at pp135-6 (CA). Note that the Court of Appeal attached considerable significance to the Commissioner's finding that Mr Greiner did not see himself as acting contrary to known and recognised standards of honesty and integrity and nor would a notional jury have seen his conduct in that way.

179 For the view that "corruptly" is a "simple English adverb, See Wellburn (1979) Cr App R 254. The South Australian case is *Johnson* [1967] SASR 279, a case on secret commissions. Cf *Gallagher (1985)* 16 Crim App R 215; *Dillon and Riach* [1982] VR 434. On "corruptly" generally see Lanham et al, *op cit*, 205-208, 213, 233-242.

180 *Herscu* (1991) 103 ALR 1, at 6.

181 SA: 238(1)

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arguments in bribery. However, in the secret commissions area there tends to be more emphasis on non-disclosure of the payment to the principal as the essence of the term "corruptly". But relying on the fact that the payment was not known and assented to by the principal is unsatisfactory for reasons similar to those applicable to the issue of consent in theft: lack of knowledge by the principal or secrecy does not necessarily indicate corruption, although it may raise a strong inference that the payment was corrupt.

Conclusion

Submissions, including that of one of the experts in this area, Professor Lanham, generally favoured the use of dishonesty as the fault element for bribery. Those who held a different view tended to favour "corruptly". As noted above, the new Queensland Code has used the term dishonestly. One submission, from the NSW Cabinet Office, criticised the dishonesty approach, among other reasons, because dishonesty is a broader term than corruptly. It pointed out that obtaining property by deception from an agent would fit the definition of bribery. This is true; the offences logically overlap in some cases. The essence of bribery is the dishonesty of the payment in connection with the performance of a duty owed by an agent. The dishonesty flows not merely from the fact of payment but from the circumstances and nature of what is sought. (Although, it is important to notice that both at common law and in statutory schemes, the payment need not necessarily lead to the departure from duty: see below under "duty"). The practical consequence of the overlap is slight: the appropriate charge may be bribery or obtaining by deception depending on the circumstances. On the other hand, the price of adopting a very complex definition of corruption is, as argued above, too great.

The flexibility of the dishonesty concept in allowing an assessment of the dealing against the standards of ordinary people is the best and most workable way of capturing the essence of bribery and other corrupt payments: corrupt payments to an agent in relation to the duty owed to the principal. In many ways, the arguments for dishonesty for these offences parallel the arguments put earlier in this Report in relation to the concept of dishonesty as a fault element in theft and fraud .

> Because honest and dishonest behaviour is so variable, attempts at capturing the substance of that concept in a statutory definition would be as difficult as a statutory definition of the concept of negligence. The best that the law can do with such general concepts is to commit them to the jury as the arbiter of community standards in such cases. As indicated above, MCCOC believes the jury is in a better position than the judge to interpret community standards of dishonesty. This is not a novel proposition in the law generally - negligence being the most obvious example.

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> The *Feely/Ghosh* test is the best way of dealing with an issue that has been part of the law of theft for a very long time. The *Theft Act* merely substituted the term "dishonestly" for the term "fraudulently" in the old common law definition of larceny. The argument in *Feely* and *Ghosh* only continued earlier debates about the meaning of "fraudulently". Indeed the *Feely* test has been adopted as the correct test for "fraudulently" in both New South Wales and South Australia - common law jurisdictions - and for "dishonesty" in Queensland - a *Griffiths Code* jurisdiction - in Australia. Trial judges in Tasmania generally adopt the *Feely* approach. It is also the test in all jurisdictions for conspiracy to defraud. The Queensland Code Review Committee has proposed the *Feely/Ghosh* test. The Murray review in Western Australia has proposed the term "intent to defraud" but this appears to be little different to the common law term fraudulently which has in turn been interpreted to mean the *Feely* test.
>
> In view of the conflict in the authorities and the diversity in the various Australian jurisdictions, some common test has to be laid down in the *Model Criminal Code*. MCCOC concludes that not only is the *Feely/Ghosh* test the most satisfactory in principle but that it also represents the majority consensus across the jurisdictions.[182]

The same reasoning applies to the fault element for bribery and secret commissions. While the quest for certainty in the criminal law is very much to be desired, the quest itself can be counterproductive if the definitions of concepts like "corruptly" become too complex, or in striving for precision catch cases that should not be caught, or fail to catch cases that should be caught. The Committee believes that the term dishonesty as defined in s14.2 is the concept which best captures the fault element for the offences of bribery and secret commissions. Although there may be shades of different meaning between the concepts of "corruptly" and "dishonestly", dishonesty is a more accessible concept for juries than corruptly and accurately identifies the prohibited evil. It also has the necessary flexibility to deal with the wide variety of circumstances in which offences can occur. This includes the difficult cases involving elected officials. Undoubtedly, it will be difficult in the borderline cases for the jury to decide on the honesty of a transaction in a political context where the jury may not be familiar with the mores of political life. However, dishonesty is a general concept in our communities and honesty in political life as much as in commercial life and elsewhere must ultimately be measured against a general standard. Juries are asked to assess honesty in a variety of fields every day. Despite their imperfections, they are the best available mechanism for assessing community standards on the question of dishonesty in the political context as well as in the other contexts.

182 P.27

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Dishonesty is defined in s14.2. MCCOC has not decided to introduce any special qualifications on the concept of dishonesty for these offences. The Discussion Paper canvassed two qualifications placed on the South Australian concept of "improper" to cover trivial gifts - such as the bottle of Scotch at Christmas:

> A person will not be taken to have acted improperly for the purposes of this part unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.
>
> And it is a defence if:
>
> . . . the act was of a trivial character and caused no significant public detriment.[183]

Because this sort of case would not be regarded as dishonest, it is extremely unlikely that anyone would be charged with an offence let alone convicted in such a case. For this reason, MCCOC has decided that these qualifications are not necessary.

A general bribe?

Another issue is whether there needs to be a particular or specific matter that a bribe is intended to influence. The NSW Discussion Paper expresses the view that the legislation should make it clear that the benefit sought to be obtained may be of a general nature and the parties need not have in mind any particular benefit to be provided. The Finn Working Paper expresses a similar view.[184] Sections 20.2 and 20.3 are expressed in terms of influencing the agent's duty rather than providing benefits. Hence this problem should not arise.

20.2(3) - Intent to obtain a favour

The final fault element in the bribery offences is an intent that the benefit should cause the agent to provide a favour. Favour is defined in s20.2(3) as an intention that the agent will be influenced in the exercise of his or her functions as agent, will do or not do an act because of his or her position as an agent, or that the agent will influence his or her principal or agents of the principal to act in some way. The two offences are designed around the giver or receiver's intention and it is not necessary that any agreement has been reached. Hence some of the problems of mutuality discussed in relation to common law and other statutory definitions of bribery do not arise. [185]

This raises a question about the connection between the action that the briber wishes the official to take and the actual duties of the agent. If the briber makes

183 SA: 238(3)(c)
184 Page 34.
185 Lanham et al, 209-10.

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a mistake about the duties of the agent it may be thought that no bribe has occurred. Where an officer has held himself out as having certain duties or functions, the criminality of his conduct should not depend on the precise lawful scope of his duties. The Gibbs Committee, the New South Wales Discussion Paper and the US *Model Penal Code* broadly provide to the same effect. This problem does not arise under these provisions. Section 20.2 covers the case where the agent has held himself or herself out as having a duty that he or she does not have because it is based on the intention of the offerer. If the apparent agent is not an agent, the defendant could still be prosecuted for attempting to bribe even though that was impossible in the circumstances because the intended recipient was not an agent.[186] Where the apparent agent deceived the giver of the bribe, the apparent agent could be charged with incitement to commit bribery or obtaining by deception.

The related problem where one party intends to bribe an agent, for example an official, and gives the official a benefit but the official knows about the plan and does not intend to accede to it, is also covered by the offence definitions. The provisions do not require an agreement between the giver and the receiver of the bribe. They only require the intent on the part of one party and the completed offence is committed by the giver. The receiver may be guilty of complicity in the giving of the bribe or obtaining by deception, depending on the circumstances. The receiver would not satisfy the criteria of receiving a bribe. In a case of entrapment, where for example, the giver intends to trap an official, the giver would not satisfy the dishonesty requirement. The receiver would be guilty of an offence against s20.2(2). The general problems of entrapment operate here but in the absence of general entrapment provisions, the receiver would be guilty and any mitigation would only affect the sentence.

Duty

The question sometimes arises whether what the agent is asked to do falls within the scope of his or her duty. In *Herscu,* the High Court held that duty was not restricted to matters the agent was legally obliged to do but included functions which were the agent's functions to perform. The drafting of 20.2(3)(a) reflects this ruling.[187]

Some definitions of bribery exclude situations where an agent takes a benefit to refrain from doing something which he or she is in a position to do by virtue of the fact that he or she is an agent, but is not part of his or her duty. An example arose in the case of *Ip Chiu* where a police officer took a payment from a suspect who paid the money to avoid being beaten up or having evidence planted.

186 See s11.1(4)(a) *Criminal Code Act 1995 (Cth).*

187 On the issue of what falls within the concept of "duty" see *Herscu* (1991)103 ALR 1 (High Court) and Lanham et al, *op cit* 206-208. Sections 20.2(2) and 20.3(2) and the "functions" in s20.1 go beyond the concept of duty. Gibbs, p201; the NSW Discussion Paper p34; US *Model Penal Code* 240.1.

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The Privy Council held that neither of these fell within the duty of the police officer. A similar problem arises where an agent receives a payment with the intention of doing something which is within his or her duty anyway (eg to process an application). In both cases, the definition of favour depends on the status of the agent rather than the scope of the duty. If the action is something the agent is in a position to do by virtue of the position of agent, then the question will be whether the receipt of the payment will be dishonest.

While this will vary from case to case, there can be little doubt that the police officers in *Ip Chiu* would be convicted on such a test. An official who received large irregular payments for doing what he or she was obliged to do by law would also be at risk. (Alternatively, the official would also be at risk of a conviction under s20.5) The High Court in *Herscu* favoured the wider view that the offence applied to things done in an official capacity. It clearly envisaged that accepting payments for things within the scope of duty could be caught by bribery offences. An agent who received payments outside the course of regular remuneration would be likely to be found dishonest. The giver of the payment in both cases may also be vulnerable to prosecution for bribery. While the giver in a case like *Ip Chiu* may deserve some sympathy, irregular payments to agents ought to be discouraged. In a very sympathetic case, there may be grounds for the exercise of prosecutorial discretion; nothing requires *both* the giver and the receiver to be prosecuted. In a case like *Ip Chiu* where actual threats are used to obtain the payment, the defendant can be charged with blackmail. Public officials who dishonestly discharge or refuse to discharge their duty with the intent to obtain a benefit commit a separate offence of abuse of public office (s20.5, see below).[188]

Physical elements

20.1 - Benefit

Benefit is a common element in the four offences. It is defined broadly in s20.1 to include property or *any advantage*. Clearly, the sorts of benefits that can be conferred in a bribe are many and varied and anything that can be said to constitute a benefit should be covered. "Advantage" is itself a broad term. MCCOC believes that no further definition of benefit is necessary. Benefit could extend to small things like gratuities but the requirement that the transaction be dishonest would preclude tips and the like being treated as bribes.

20.1 - Agent

Because the bribery offences will now apply to the public and private sector, a common term has to be found to define the class of people affected. The term "agent" - the term used in the present secret commissions offences - was the obvious choice.

188 [1980] AC 663. The High Court in *Herscu* approved the view taken in *Ip Chiu* that the notion of duty could not be limited to things that the official was legally obliged to do, at 6 and 8-9.

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The definitions of "agent" in the existing State Acts are wide and apply to people who are, have been and who intend to become agents. Obviously, a person should not be able to avoid liability for these offences - assuming all the other elements are proved - simply because he or she sought the benefit just before being appointed to a position, or was paid a reward just after resignation. Section 20.1(2) covers this situation.

The core of the inclusive statutory definitions is that the agent acts on behalf of another person. This is much wider than the common law: an agent was someone who could alter legal relations between the principal and third parties.[189] The statutory definitions then go on to list categories of people (acting on behalf of another as agent, partner, co-owner, etc . . . or in any other capacity). The definition in s20.1 retains the essence of the old definition of agent but uses the general criterion that the person must have been acting with the actual or implied authority of the principal as one of the bounds on the concept of agency. The definition lists some categories of people who clearly fall within the notion of agency, for example employees (s20.1(c)). The general provision includes other sorts of people who may or may not be agents, depending on the circumstances. For example, independent contractors like independent shearers hired out by a booking agency would not be agents of the booking agency; a shearer working for a shearing firm would be. A person who has been told by a principal *not* to act on his or her behalf would not be an agent but may commit other offences if he or she takes money on the pretence that he or she was the agent of the principal.

The definition of agent includes a sub-definition of "public officials" - who would not otherwise fall within the normal meaning of the term "agent". Members of Parliament, ministers, judges, police officers, local councillors and some statutory office holders are some examples. Some jurisdictions have special provisions for bribing judicial officers, parliamentarians and the like. As stated above, MCCOC does not believe that the general offence should distinguish on the basis of the status of the official concerned. The definition of "agent" includes "judicial officers". In the case of public officials, the principal is the Government or government agency concerned.

The definition of "agent" is drawn very widely to catch a pool of relationships where there may be said to be a relationship of trust. The ambit of the offence is then set by two conditions. First, the benefit given or received must be in connection with the person's role as agent. Second, the benefit must be given or received *dishonestly*. The wider the range of behaviour covered by these offences, the more important it is that the fault element be flexible enough discriminate among the myriad of circumstances that can arise to determine those transactions which are corrupt.

189 See the example reproduced in footnote 168. The definition was discussed in *Gallagher* (1985) 16 Crim App R 215.

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20.2 - Third-party bribes

Finally, a number of submissions - for example, the submission from the Independent Commission Against Corruption - pointed out that the definition of bribery in DP2 would not cover what has come to be the described as the third-party bribe situation following the decision in *Glynn.*[190] The clearest example of this is the payment of a sum of money to a political party in government with the dishonest intention of obtaining a favour from a third party, for example, a minister in the government. This is not covered in the existing law of bribery because the benefit is not paid to the agent (the Minister) but to another party (the political party). This is clearly corrupt and should be included within the definition of bribery. The element of dishonesty distinguishes this from legitimate donations to political parties. The inclusion of the words "a benefit to any agent *or other person*" in ss20.2 will mean that a payment to one person with the intention that the agent will provide a favour will fall within the definition of bribery and other corrupting benefits. The new Queenslan Code includes a similar provision (ss258 - 260).

20.2 Giving/receiving

The offence of giving a bribe extends not only to the actual giving of a benefit but also to an offer or a promise to provide a benefit. The act of receiving a benefit applies to asking for a benefit and obtaining a benefit for the receiver or another person.

190 *(1994) 33 NSWLR 139.*

Other corrupting benefits

20.3 (1) Giving other corrupting benefits. A person who dishonestly provides, or offers or promises to provide, a benefit to any agent or other person in any case where the receipt, or expectation of the receipt, of the benefit would in any way tend to influence the agent to provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(2) Receiving other corrupting benefits. An agent who dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another person in any case where the receipt, or expectation of the receipt, of the benefit by the agent would in any way tend to influence the agent to provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(3) For the purposes of this section, a favour is:

(a) the agent being influenced or affected in the exercise of the agent's functions as such an agent; or

(b) the agent doing or not doing something as such an agent or because of his or her position as such an agent; or

(c) the agent causing or influencing his or her principal or other agents of the principal to do or not to do something.

20.3 - Giving/receiving other corrupting benefits

The offences of giving or receiving other corrupting benefits share a number of the elements of the bribery offences: the concepts of dishonesty, benefit and agent have already been discussed. The commentary will only deal with the concepts that are different.

The structure and name of the offences

The committee consulted extensively about the structure of the bribery offences in light of the recommendation in DP2 that bribery should extend to the private sector. The options canvassed in DP2 were a two-level offence structure with bribery as the more serious offence and secret commissions as the less serious offence. The less serious offence differed from bribery in that the proof would be less onerous: there would be no need to prove an advance arrangement: the fact that the benefit had the tendency of corrupting, that would suffice. However, as a corollary of the less onerous nature of the proof, the reverse onus of proof that exists in some jurisdictions would be abolished as inappropriate to an offence which carried a maximum term of 5 years.

Submissions varied on this structure between those who advocated one single broader offence and the two-level structure suggested. The majority supported the two level structure. Most of those consulted agreed that the reverse onus provisions were not appropriate for an offence carrying such a high penalty. Mr Paul Coghlan, a very experienced barrister in secret commissions cases, raised the possibility of a two year offence with a reverse onus provision. Ultimately, the Committee decided that the other corrupting benefit with a 5 year penalty was necessary and that a third offence would introduce too much complexity.

The name "other corrupting benefits" replaces the old name "secret commissions. In DP2, the committee signalled its concern that the term "secret commissions" was not sufficiently communicative. The word "secret" does not appear in the text of any of the secret commissions offences although it appears in titles, headnotes or sidenotes. One option was to call the offence "conflict of interest" but that name did not seem suitable because the mere existence of a conflict of interest does not constitute an offence. Even if the conflict of interest calls for some action, failure to act does not necessarily amount to criminal conduct. Other options were "dishonest commissions", "dishonest payments", or "dishonest inducements or rewards". As noted, secrecy is not an element of the offence in any jurisdiction. In the State and Territory Acts, the concept of secrecy is supplied by the term "corruptly" and in the Commonwealth legislation it is supplied by the phrase "without the full knowledge and consent of the principal".[191] Submissions varied on this issue but Professor Lanham suggested the use of corruption in the title. This suggestion has been adopted.

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191 The current maximum penalty appears in brackets. Cth: *Secret Commissions Act* 1905(2 years); NSW: ss249-249J (7 years); Vic: ss175-186 (10 years); SA: *Secret Commission Act* 1920 (6 months); Tas: 266 (21 years); WA: ss529-546 (7 years); Qld: ss442A-442M (1 year); NT: ss236-237 (3 years).

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-Inducement or reward

The principal difference between the two offences is that for bribery the benefit must have been offered or given in advance to induce the favour, whereas for other corrupting benefits, the benefit must have the tendency to influence the agent to show the person favour or disfavour in relation to the principal's business. Thus, for a corrupting benefit, there will be no need to prove a prior arrangement intended to influence the agent's duty. It will be sufficient that a benefit was conferred as a *reward* for a previous breach of duty.

Fault elements

-Dishonesty

As for bribery, the key fault element for this offence is dishonesty. This is qualified in the case of this offence by a variant of the usual provision that custom is no defence to the receipt of a secret commission. Thus the fact that there is a tradition of corrupt payments in a particular sphere was no defence to a charge of receiving secret commissions. Section 20.1(3) modifies this slightly by providing that payments may be found dishonest even if they are customary.

-What must be intended to be done

The corrupting benefit offences also differ from bribery in the intent about what is to be done. The intent to provide a benefit to an agent where that payment is dishonest and has the tendency to influence the agent to provide a favour or disfavour will suffice. The benefit would have to have that tendency in fact and the defendant would need to know or be reckless as to that tendency. This is a less exacting requirement than for bribery.

-Reverse onus of proof

It is common for the existing secret commissions offences to reverse the onus of proof if the benefit has been received without the consent of the principal. Equivalent provisions appear in most but not all State Acts; however there is no similar provision in the Commonwealth Act. In *Jamieson* the court said that this provision effects a reversal of the onus of proof as to the mental element which it described as "draconian". Removal of this reversed onus was recommended in the SA Discussion Paper. The argument for retention is the difficulty of proving relevant matters which almost invariably will take place in private. On the other hand, it is difficult to accept that it is any more difficult to prove dishonesty in these cases than in theft or fraud, especially if it is established that the principal did not know about and consent to the payment. In addition, because the proposed penalty for these offences is a maximum of 5 years (compared with the traditional penalty of about 2 years), it would be inconsistent with general criminal law principles and the presumption established in s13.1 of the *Criminal Code Act* 1995 to provide for a reverse onus

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of proof for these offences. MCCOC concludes that there should not be a reverse onus of proof in the secret commissions offences.[192]

-Right of recovery

The Commonwealth Act gives the principal a right of civil action against the person who gives or receives the benefit in question. Some State Acts provide for an order for a payment of the benefit to be made at time of conviction. The same issue arises in a number of offences and should be dealt with in the context of restitution.[193]

192 *Jamieson* (1987) 34 A Crim R 308 at p311. SA Discussion Paper para 4.12.

193 Cth: s7 *Secret Commissions Act* 1905; NSW 249G; Qld: s 442I; SA: s12(b), *Secret Commissions Act*.

Payola

20.4 A person who:

(a) holds himself or herself out to the public as being engaged in any business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services; and

(b) dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another in order to influence his or her selection, examination or opinion,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

20.4 - Payola

Submissions pointed out the need to cover cases of people who hold themselves out to the public as making independent selections or assessments of goods and services who in fact receive "kickbacks" for their selection. Restaurant and theatre reviewers, financial advisers, television presenters and others who recommend goods or services to the public generally fall within this category. In the United States, for example, there have been cases involving record companies making large payments to disc jockeys to play their records on radio.

Independent advisers may be acting for an individual principal and in that case they will be agents for the purposes of the bribery and corrupting payments provisions. However, where such people are giving advice or selections to the public at large, they are not agents and are not covered by the bribery or other corrupting benefits provisions. Such independent advisers owe their duty to the public generally rather than a specific principal, even where their opinions are published through a media outlet, their duty is not so much to the owner of that outlet as it is to the public at large. There can be no doubt that the culpability involved in receiving money for giving dishonest opinions in these circumstances merits a punishment similar to the giving or receiving corrupting benefits provisions. MCCOC has decided that the *MCC* should include an offence to cover this situation.

Section 20.4 is modelled on s237 of the Northern Territory *Criminal Code Act* 1991. The principal fault element of the offence is to dishonestly ask for a benefit in order to influence the selection of property or services. The other fault element is the intent to hold one's self out as offering disinterested opinions about goods or services.

The physical elements for the offence are that the person holds him or herself out as offering disinterested opinions in respect of property or services and asking for, receiving or agreeing to receive a benefit for him or herself or another in order to influence his or her selection or opinion.

Remuneration for doing the work necessary to give the selection would not be caught by this provision because it is not dishonest and is not intended to influence the selection or opinion. Provision of things like free trips to travel writers may or may not be dishonest, depending on the circumstances. A disclosure that the trip had been provided would remove the suggestion of dishonesty. Other payments to the reviewer by the provider of the goods or services under review would be harder to explain.

The penalty for the offence will be 5 years, the same as for the giving or receiving other corrupting benefits.

Abuse of public office

20.5 A public official who dishonestly:

(a) exercises any function or influence that the official has because of his or her public office; or

(b) refuses or fails to exercise any function the official has because of his or her public office; or

(c) uses any information the official has gained because of his or her public office,

with the intention of obtaining a benefit for the official or another person or causing a detriment to another person, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

20.5 - Abuse of Public Office

The common law has a series of offences generally termed "misfeasance in office". The Codes have similar offences. They deal with public office holders who improperly use their position in a variety of ways for their own benefit.[194] Some examples of misfeasance are nepotism (eg improperly appointing a relative to a position) or the use of information gained in public office (eg a planning Minister to invest in a block of land in the knowledge that he or she was about to change the planning law). Unlike bribery, these acts are unilateral on the part of the office holder: the office holder does not act at the instigation of another or seek to influence another. Unlike blackmail, they do not involve threats or coercion.

The Gibbs Committee concluded based on the use or non-use of a power for an improper motive was too vague and recommended a narrower offence of exercising a power or function vested in an office holder for a dishonest or unlawful purpose. The Gibbs Committee recommended abolition of the common law offence. It should be noted that there is a range of administrative remedies for some of this conduct and that it would also be subject to disciplinary proceedings and Parliamentary criticism in the case of Ministers and MPs.[195]

In DP2, the Committee suggested an offence modelled on the South Australian legislative reforms in this area. Submissions strongly supported this approach.[196]

The elements of this offence are vaguer than for the offences of bribery and secret commissions. As for the other corruption offences, the key fault element is dishonesty. All public servants exercise their power to benefit themselves in the sense that they are paid a salary. Similarly, they often leave the public service and set up in business as consultants and use the information they have accumulated as public servants in the new business for their own benefit. But for the word "dishonestly", these activities would constitute serious offences. The term "dishonestly" has to carry the full burden of the distinction between legitimate and illegitimate benefits in these cases. The jury would need to determine whether the appointment of the relative or the use of information was dishonest. The issues are particularly difficult in relation to s.20.5. Whistleblowers would be protected by the dishonesty element. However, if a public official leaked information which would be politically embarrassing or beneficial to his or her Minister, it may be difficult to say whether that is dishonest. While it may merit disapproval, such conduct does not warrant the imposition of criminal liability. On the other hand, the example of the planning Minister using information to profit personally would seem to merit the sanction of a general criminal offence.

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194 "If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any publick officer is indictable for misbehaviour in his office." Case 136 Anon (1704) 6 Mod 96, 87 ER 853. See too Qld: s92;Qld (New): s199; NT: s82; Tas: s115; WA: s83.

195 Gibbs, *Fourth Report* pp281-287.

196 SA: s251.

CRIMINAL CODE OF STATE/TERRITORY

A BILL FOR

An Act to codify the criminal law.

The Parliament of [Name of State/Territory] enacts:

Short title

1. This Act may be cited as the *Criminal Code ([Name of State/Territory]) Act 1994*.

Commencement

2. (1) This Act commences on a day or days to be fixed by Proclamation.

(2) Different days may be fixed for the commencement of different provisions of the Schedule.

The Criminal Code

3.(1) The Schedule has effect as a law of [(Name of State/Territory)].

(2) The Schedule may be cited as the *Criminal Code of ([Name of State/Territory])*.

Definitions

4.(1) Expressions used in the Code (or in a particular provision of the Code) that are defined in the Dictionary at the end of the Code have the meanings given to them in the Dictionary.

(2) Definitions in the Code of expressions used in the Code apply to its construction except in so far as the context or subject matter otherwise indicates or requires.

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SCHEDULE

THE CRIMINAL CODE OF [(NAME OF STATE/TERRITORY)]

CHAPTER 1 - CODIFICATION

Division 1

Codification

1.1 The only offences against laws of [Name of State/Territory] are those offences created by, or under the authority of, this Code or any other Act of [Name of State/Territory].

CHAPTER 2 - GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

PART 2.1 - PURPOSE AND APPLICATION

Division 2

Purpose

2.1 The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of [Name of State/ Territory]. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

Application

2.2 (1) This Chapter applies to all offences against this Code.

(2) On and after the day occurring 5 years after the day on which the Criminal Code Act 1994 of [Name of State/Territory] receives the Royal Assent, this Chapter applies to all other offences.

(3) Section 11.6 applies to all offences.

PART 2.2 - THE ELEMENTS OF AN OFFENCE

Division 3 - General

Elements

3.1 (1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

Establishing guilt in respect of offences

3.2 In order for a person to be found guilty of committing an offence the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note: See Part 2.6 on proof of criminal responsibility.

Division 4 - Physical elements

Physical elements

4.1 (1) A physical element of an offence may be:

(a) conduct; or

(b) a circumstance in which conduct occurs; or

(c) a result of conduct.

(2) In this Code:

"conduct" means an act, an omission to perform an act or a state of affairs.

Voluntariness

4.2 (1) Conduct can only be a physical element if it is voluntary.

(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

(3) The following are examples of conduct that is not voluntary:

(a) a spasm, convulsion or other unwilled bodily movement;

(b) an act performed during sleep or unconsciousness;

(c) an act performed during impaired consciousness depriving the person of the will to act.

(4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.

(5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

(6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

(7) Intoxication is self-induced unless it came about:

(a) involuntarily; or

(b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

Omissions

4.3 An omission to perform an act can only be a physical element if:

(a) the law creating the offence makes it so; or

(b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

Division 5 - Fault elements

Fault elements

5.1 (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

Example: The fault element for the offence of judicial corruption under section 32 of the *Crimes Act 1914* of the Commonwealth is that the relevant conduct be carried out “corruptly”.

Intention

5.2(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Knowledge

5.3 A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

Recklessness

5.4(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Negligence

5.5 A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

Offences that do not specify fault elements

5.6(1) If the law creating the offence does not specify a fault element for a physical element of an offence that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element of an offence that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Division 6 - Cases where fault elements are not required

Strict liability

6.l (l) If a law that creates an offence provides that the offence is an offence of strict liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 9.2 is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.

(3) The existence of strict liability does not make any other defence unavailable.

Absolute liability

6.2 (1) If a law that creates an offence provides that the offence is an offence of absolute liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 9.2 is unavailable.

(2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.

(3) The existence of absolute liability does not make any other defence unavailable.

PART 2.3 - CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

Note: This Part sets out defences that are generally available. Defences that apply to a more limited class of offences are dealt with elsewhere in this Code and in other laws.

Division 7 - Circumstances involving lack of capacity

Children under 10

7.1 A child under 10 years old is not criminally responsible for an offence.

Children over 10 but under 14

7.2 (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

(2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

Mental impairment

7.3 (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

(a) the person did not know the nature and quality of the conduct; or

(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

(c) the person was unable to control the conduct.

(2) The question whether the person was suffering from a mental impairment is one of fact.

(3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.

(4) The prosecution can only rely on this section if the court gives leave.

(5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.

(6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.

(7) If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.

(8) In this section: "mental impairment" includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.

(9) The reference in subsection (8) to mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

Division 8 - Intoxication

Definition - self-induced intoxication

8.1 For the purposes of this Division, intoxication is self-induced unless it came about:

(a) involuntarily; or

(b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

Intoxication (offences involving basic intent)

8.2 (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.

(2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance is not a fault element of basic intent.

(3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.

(4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

(5) A person may be regarded as having considered whether or not facts existed if:

(a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Intoxication (negligence as fault element)

8.3 (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.

(2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

Intoxication (relevance to defences)

8.4 (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.

(2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

(3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

(4) If, in relation to an offence:

(a) each physical element has a fault element of basic intent; and

(b) any part of a defence is based on actual knowledge or belief;

evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.

(5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance is not a fault element of basic intent.

Involuntary intoxication

8.5 A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

Division 9 - Circumstances involving mistake or ignorance

Mistake or ignorance of fact (fault elements other than negligence)

9.1 (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:

(a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and

(b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.

(2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

Mistake of fact (strict liability)

9.2 (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:

(a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and

(b) had those facts existed, the conduct would not have constituted an offence.

(2) A person may be regarded as having considered whether or not facts existed if:

(a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Note: Section 6.2 prevents this section applying in situations of absolute liability.

Mistake or ignorance of statute law

9.3 (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:

(a) the Act is expressly or impliedly to the contrary effect; or

(b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.

Mistake or ignorance of subordinate legislation

9.4 (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence he or she is mistaken about, or ignorant of, the existence or content of the subordinate legislation that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:

(a) the subordinate legislation is expressly or impliedly to the contrary effect; or

(b) the ignorance or mistake negates a fault element that applies to a physical element of the offence; or

(c) at the time of the conduct, copies of the subordinate legislation have not been made available to the public or to persons likely to be affected by it, and the person could not be aware of its content even if he or she exercised due diligence.

(3) In this section:

"available" includes available by sale;

"subordinate legislation" means an instrument of a legislative character made directly or indirectly under an Act, or in force directly or indirectly under an Act.

Claim of right

9.5 (1) A person is not criminally responsible for an offence that has a physical element relating to property if:

(a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and

(b) the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.

(3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

Division 10 - Circumstances involving external factors

Intervening conduct or event

10.1 A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:

(a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and

(b) the person could not reasonably be expected to guard against the bringing about of that physical element.

Duress

10.2 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.

(2) A person carries out conduct under duress if and only if he or she reasonably believes that:

(a) a threat has been made that will be carried out unless an offence is committed; and

(b) there is no reasonable way that the threat can be rendered ineffective; and

(c) the conduct is a reasonable response to the threat.

(3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

Sudden or extraordinary emergency

10.3 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

(2) This section applies if and only if the person carrying out the conduct reasonably believes that:

(a) circumstances of sudden or extraordinary emergency exist; and

(b) committing the offence is the only reasonable way to deal with the emergency; and

(c) the conduct is a reasonable response to the emergency.

Self-defence

10.4 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or

(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or

(c) to protect property from unlawful appropriation, destruction, damage or interference; or

(d) to prevent criminal trespass to any land or premises; or

(e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:

(a) to protect property; or

(b) to prevent criminal trespass; or

(c) to remove a person who is committing criminal trespass.

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

PART 2.4 - EXTENSIONS OF CRIMINAL RESPONSIBILITY

Division 11

Attempt

11.1 (1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note:Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(4) A person may be found guilty even if:

(a) committing the offence attempted is impossible; or

(b) the person actually committed the offence attempted.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying-provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose) or section 11.5 (conspiracy).

Complicity and common purpose

11.2 (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

Innocent agency

11.3 A person who:

(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and

(b) procures conduct of another person that (whether or not together with the conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

Incitement

11.4 (1) A person who urges the commission of an offence is guilty of the offence of incitement.

(2) For the person to be guilty, the person must intend that the offence incited be committed.

(3) A person may be found guilty even if committing the offence incited is impossible.

(4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

Maximum penalty:

(a) if the offence incited is punishable by life imprisonment - imprisonment for 10 years; or

(b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment - imprisonment for 7 years; or

(c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more - imprisonment for 5 years; or

(d) if the offence is otherwise punishable by imprisonment - imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or

(e) if the offence incited is not punishable by imprisonment - the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under section 4D of the Crimes Act 1914, these penalties are only maximum penalties. Subsection 4B (2) of at Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B (3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in second 4AA of that Act.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

Conspiracy

11.5 (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

(2) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(3) A person may be found guilty of conspiracy to commit an offence even if:

(a) committing the offence is impossible; or

(b) the only other party to the agreement is a body corporate; or

(c) each other party to the agreement is at least one of the following:

(i) a person who is not criminally responsible;

(ii) a person for whose benefit or protection the offence exists; or

(d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(4) A person cannot be found guilty of conspiracy to commit an offence if:

(a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or

(b) he or she is a person for whose benefit or protection the offence exists.

(5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:

(a) withdrew from the agreement; and

(b) took all reasonable steps to prevent the commission of the offence.

(6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

(7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

References in Acts to offences

11.6 (1) A reference in an Act to an offence against an Act (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.

(2) A reference in an Act (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.

(3) Subsection (1) or (2) does not apply if an Act is expressly or impliedly to the contrary effect.

Note: Sections 11.2 (complicity and common purpose) and 11.3 (innocent agency) of this Code operate as extensions of principal offences and are therefore not referred to in this section.

PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY

Division 12

General principles

12.1 (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

Physical elements

12.2 If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

Fault elements other than negligence

12.3 (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2) (b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2) (c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high

managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

"board of directors" means the body (by whatever name called) exercising the executive authority of the body corporate;

"corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place;

"high managerial agent" means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

Negligence

12.4 (1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems or conveying relevant information to relevant persons in the body corporate.

Mistake of fact (strict liability)

12.5 (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

(a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

(b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Intervening conduct or event

12.6 A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

PART 2.6 - PROOF OF CRIMINAL RESPONSIBILITY

Division 13

Legal burden of proof prosecution

13.1 (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Code:

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

Standard of proof prosecution

13.2 (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

Evidential burden of proof - defence

13.3 (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

(4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(5) The question whether an evidential burden has been discharged is one of law.

(6) In this Code:

"evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Legal burden of proof - defence

13.4 A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

(a) specifies that the burden of proof in relation to the matter in question is a legal burden; or

(b) requires the defendant to prove the matter; or

(c) creates a presumption that the matter exists unless the contrary is proved.

Standard of proof - defence

13.5 A legal burden of proof on the defendant must be discharged on the balance of probabilities.

Use of averments

13.6 A law that allows the prosecution to make an averment is taken not to allow the prosecution:

(a) to aver any fault element of an offence; or

(b) to make an averment in prosecuting for an offence that is directly punishable by imprisonment.

CHAPTER 3 - THEFT, FRAUD, BLACKMAIL, FORGERY, BRIBERY AND RELATED OFFENCES

PART 3.1 - PURPOSE AND DEFINITIONS

Division 14

Purpose

14.1 The purpose of this Chapter is to codify the law of theft, fraud, blackmail, forgery, bribery and related offences.

Dishonesty

14.2 (1) In this Chapter, "dishonest" means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

(2) In a prosecution for an offence, dishonesty is a matter for the trier of fact.

Note: Section 15.2 affects the meaning of dishonesty in offences related to theft and section 17.2(3) affects the meaning of dishonesty in the offences of obtaining property or a financial advantage by deception. See also section 9.5 (Claim of right).

Gain and loss

14.3 (1) In this Chapter:

"gain" or "loss" means gain or loss in money or other property, whether temporary or permanent, and:

(a) "gain" includes keeping what one has; and

(b) "loss" includes not getting what one might get.

(2) In this Chapter:

(a) "obtaining" a gain means obtaining a gain for oneself or for another; and

(b) "causing" a loss means causing a loss to another.

Property

14.4 In this Chapter:

"property" includes all real or personal property, including:

(a) money; and

(b) things in action or other intangible property; and

(c) electricity; and

(d) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of a person;

Person to who property belongs

14.5 For the purposes of this Chapter, property belongs to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).

Drafting note: The following provision is only required in jurisdictions that have laws that prevent a husband or wife from taking proceedings against the other party to the marriage for an offence in relation to property belonging to the husband or wife if the parties were living together at the time (for example, see section 16A of the Married Persons (Property and Torts) Act 1901 (NSW).) The provision could be included in the relevant legislation.

Proceedings for offence may be taken by husband against wife and vice versa

14.6 Despite anything to the contrary in any other Act, proceedings for an offence against this Chapter relating to property belonging, or claimed to belong, to a person who was married at the time of the alleged offence may be taken by the person against the other party to the marriage, whether or not the parties were living together at the time of the alleged offence.

PART 3.2 - THEFT AND RELATED OFFENCES

Division 15 - Theft

Theft

15.1 (1) A person who dishonestly appropriates property belonging to another, with the intention of permanently depriving the other of it, is guilty of the offence of theft.

Maximum penalty: Imprisonment for 10 years.

(2) The following provisions of this Division apply to the offence of theft.

Dishonesty - interpretation

15.2 (1) A person's appropriation of property belonging to another is not dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps. This subsection does not apply if the person appropriating the property held it as trustee or personal representative.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.

Appropriation - interpretation

15.3 (1) Any assumption of the rights of an owner to ownership, possession or control of property, without the consent of a person to whom it belongs, amounts to an appropriation of the property. This includes, if a person has come by property (innocently or not) without committing theft, any later such assumption of rights without consent by keeping or dealing with it as owner.

(2) If property or a right or interest in property is or purports to be transferred or given to a person acting in good faith, a later assumption by the person of rights which the person had believed himself or herself to be acquiring, does not, because of any defect in the transferor's title, amount to an appropriation of the property.

Property - interpretation

15.4 (1) A person cannot commit theft of land or things forming part of land and severed from it by the person or by the person's directions, except in the following cases:

(a) when the person is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and the person appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in the person; or

(b) when the person is not in possession of the land and appropriates any thing forming part of the land by severing it or causing it to be severed, or after it has been severed; or

(c) when, being in possession of the land under a tenancy, the person appropriates the whole or part of any fixture or structure let to be used with the land.

(2) For the purposes of this section:

(a) land does not include incorporeal hereditaments;

(b) tenancy means a tenancy for years or any less period,

and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and let is to be construed accordingly.

Belonging to another - interpretation

15.5 (1) If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust. Accordingly, an intention to defeat the trust is an intention to deprive any such person of the property.

(2) If a person receives property from or on account of another, and is under a legal obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds belong (as against the person) to the other.

(3) If a person gets property by another's fundamental mistake, and is under a legal obligation to make restoration (in whole or in part) of the property or its proceeds , then to the extent of that obligation the property or proceeds belongs (as against the person) to the person entitled to restoration. Accordingly, an intention not to make restoration is an intention to deprive the person so entitled of the property or proceeds, and an appropriation of the property or proceeds without the consent of the person entitled to restoration.

(4) For the purposes of subsection (3), a fundamental mistake is:

(a) a mistake about the indentity of the person getting the property or a mistake as to the essential nature of the property; or

(b) a mistake about the amount of any money, direct credit into an account, cheque or other negotiable instrument if the person getting the property is aware of the mistake at the time of getting the property.

(5) Property of a corporation sole belongs to the corporation despite a vacancy in the corporation.

(6) If property belongs to 2 or more persons, a reference in this Division to the person to whom the property belongs is a reference to all those persons.

Intention of permanently depriving - interpretation

15.6 (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself has, nevertheless, the intention of permanently depriving the other of it if the person's intention is to treat the thing as his or her own to dispose of regardless of the other's rights. A borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(2) Without prejudice to the generality of subsection (1), if a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return that the person may not be able to perform, this (if done for purposes of his or her own and without the other's authority) amounts to treating the property as his or her own to dispose of regardless of the other's rights.

General deficiency

15.7 A person may be convicted of theft of all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were appropriated over a period of time.

Division 16 - Offences related to theft

Robbery

16.1 A person who commits theft and, at the time of or immediately before or immediately after doing so:

(a) uses force on any person; or

(b) threatens to use force then and there on any person,

with intent to commit theft or to escape from the scene, is guilty of the offence of robbery.

Maximum penalty: Imprisonment for 12 years and 6 months.

Aggravated robbery

16.2 A person who:

(a) commits any robbery in company with one or more other persons; or

(b) commits any robbery and at the time has an offensive weapon with him or her,

is guilty of the offence of aggravated robbery.

Maximum penalty: Imprisonment for 20 years.

Burglary

16.3 (1) A person who enters or remains in any building as a trespasser with intent:

(a) to commit theft in the building; or

(b) to commit an offence in the building that is punishable with imprisonment for 5 years or more and that involves causing harm to a person or damage to property,

is guilty of the offence of burglary.

Maximum penalty: Imprisonment for 12 years and 6 months.

(2) A person is not a trespasser merely because the person is permitted to enter or remain in the building for a purpose that is not the person's intended purpose, or as a result of fraud, misrepresentation or another's mistake.

(3) In this section, "building" includes:

(a) a part of a building; or

(b) a structure (whether or not moveable), a vehicle, or vessel, that is used, designed or adapted for residential purposes.

Aggravated burglary

16.4 A person who:

(a) commits any burglary in company with one or more other persons; or

(b) commits any burglary and at the time has an offensive weapon with him or her,

is guilty of the offence of aggravated burglary.

Maximum penalty: Imprisonment for 15 years.

Taking motor vehicle without consent

16.5 (1) A person:

(a) who dishonestly takes a motor vehicle belonging to another person; and

(b) who does not have the consent to do so from a person to whom the vehicle belongs,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Making-off without payment

16.6 (1) A person who, knowing that immediate payment for any goods supplied or services provided is required or expected from him or her, dishonestly makes off without having paid and with intent to avoid payment of the amount due, is guilty of an offence

Maximum penalty: Imprisonment for 2 years.

(2) This section does not apply if the supply of the goods or the provision of the service is contrary to law.

(3) For the purposes of this section, immediate payment includes payment at the time of collecting goods in respect of which the service has been provided.

Going equipped for theft, robbery, burglary or other offences

16.7 (1) A person who, when not at home, has with him or her any article with intent to use it in the course of or in connection with any theft or related offence is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

(2) For the purposes of this section, a related offence is robbery, burglary, an offence against section 16.5 or an offence against section 17.2.

Receiving

16.8 (1) A person who dishonestly receives stolen property, knowing or believing the property to be stolen, is guilty of the offence of receiving.

Maximum penalty: Imprisonment for 10 years.

(2) Property is stolen property if:

(a) it was appropriated or obtained in the course of any theft or any offence against section 17.2; or

(b) it was appropriated or obtained outside this jurisdiction in the course of an offence outside this jurisdiction (and that would have amounted to theft or an offence against section 17.2 if it had occurred in this jurisdiction); or

(c) it is (in whole or in part) the proceeds of sale of, or property exchanged for, stolen property and is in the possession or custody of the person who so appropriated or obtained the stolen property or who received the stolen property (or the proceeds of property) in the course of an offence against this section.

Stolen property does not include land obtained in the course of an offence against section 17.2.

(3) Property ceases to be stolen property:

(a) after the property is restored to the person from whom it was appropriated or obtained or to other lawful possession or custody; or

(b) after that person or any person claiming through him or her ceases to have any right to restitution in respect of the property.

(4) A person charged with theft may be convicted of receiving and a person charged with receiving may be convicted of theft. If the trier of fact is satisfied beyond reasonable doubt that a person has committed either theft or receiving but is unable to determine which of those offences the person has committed, the person is to be convicted of theft.

(5) A person may not be convicted of both theft and receiving in respect of the same property if the person retains possession or custody of the property.

(6) In proceedings for the offence of receiving, it does not matter whether the property concerned was stolen before or after the commencement of this section.

PART 3.3 - FRAUD

Division 17

Deception - definition

17.1 In this Part, "deception" means any deception, by words or other conduct, as to fact or as to law, including:

(a) a deception as to the intentions of the person using the deception or any other person; or

(b) conduct by a person that causes a computer system or any machine to make a response that the person is not authorised to cause it to do.

Obtaining property by deception

17.2 (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) For the purposes of this section, a person is to be treated as obtaining property if the person obtains ownership, possession or control of it, and obtain includes obtaining for another or enabling oneself or another to obtain or to retain.

(3) A person's obtaining of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.

(4) Section 15.6 applies to this section as if references to appropriating property were references to obtaining property.

(5) A person may be convicted of an offence against this section involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.

(6) A conviction for an offence against this section is an alternative verdict to a charge for the offence of theft and a conviction for the offence of theft is an alternative verdict to a charge for an offence against this section.

Obtaining financial advantage by deception

17.3 A person who by any deception dishonestly obtains for himself, herself or another any financial advantage is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

PART 3.4 - BLACKMAIL

Division 18

Blackmail

18.1 A person who makes any unwarranted demand with menaces:

(a) with the intention of obtaining a gain or of causing a loss; or

(b) with the intention of influencing the exercise of a public duty,

is guilty an offence.

Maximum penalty: Imprisonment for 12 years and 6 months.

Unwarranted demands - interpretation

18.2 (1) A demand is unwarranted unless the person believes that he or she has reasonable grounds for making the demand and reasonably believes that the use of the menaces is a proper means of reinforcing the demand.

(2) The demand need not be a demand for money or other property.

Menaces - interpretation

18.3 (1) For the purposes of this Division, menaces includes:

(a) an express or implied threat of any action detrimental or unpleasant to another person; and

(b) a general threat of detrimental or unpleasant action that is implied because the person making the unwarranted demand holds a public office.

(2) A threat against an individual does not constitute a menace unless:

(a) the threat would cause an individual of normal stability and courage to act unwillingly in response to the threat; or

(b) the threat would cause the particular individual to act unwillingly in response to the threat and the person who makes the threat is aware of the vulnerability of the particular individual to the threat.

(3) A threat against a Government or body corporate does not constitute a menace unless:

(a) the threat would ordinarily cause an unwilling response, or

(b) the threat would cause an unwilling response because of a particular vulnerability of which the person making the threat is aware.

(4) It is immaterial whether the menaces relate to action to be taken by the person making the demand.

PART 3.5 - FORGERY AND RELATED OFFENCES

Division 19

Definitions - general

19.1 (1) In this Part:

"document" includes:

(a) any paper or other material on which there is writing or on which there are marks, symbols or perforations that are capable of being given a meaning by qualified persons qualified or machines; or

(b) a disc, tape or other article from which sounds, images or messages are capable of being reproduced; or

(c) a card by means of which credit or other property can be obtained; or

(d) a formal or informal document.

(2) In this Part, a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to the document as if it were a genuine document.

(3) If it is necessary for the purposes of this Part to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove that the accused intended so to induce a particular person.

Definition - false document

19.2 (1) For the purposes of this Part, a document is false if, and only if, the document purports:

(a) to have been made in the form in which it is made by a person who did not in fact make it in that form; or

(b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or

(c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or

(d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or

(e) to have been altered in any respect by a person who did not in fact alter it in that respect; or

(f) to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or

(g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or

(h) to have been made or altered by an existing person who did not in fact exist.

(2) For the purposes of this Part, a person is to be treated as making a false document if the person alters a document so as to make it false within the meaning of this section (whether or not it is false in some other respect apart from that alteration).

(3) For the purposes of the application of this section, a document that purports to be a true copy of another document is to be treated as if it were the original document.

Forgery - making false document

19.3 A person who makes a false document with the intention that the person or another will dishonestly use it:

(a) to induce some person to accept it as genuine; and

(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 7 years and 6 months.

Using false document

19.4 A person who dishonestly uses a false document, knowing that it is false, with the intention of:

(a) inducing some person to accept it as genuine; and

(b) by reason of so accepting it, obtaining a gain or causing a loss or influencing the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

Possession of false document

19.5 A person who has in his or her possession a false document, knowing that it is false, with the intention that the person or another will dishonestly use it:

(a) to induce some person to accept it as genuine; and

(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

Making or possession of devices etc. for making false documents

19.6 (1) A person who makes, or has in his or her possession, any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, with the intention that the person or another person will use it to commit forgery, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

(2) A person who, without lawful excuse, makes or has in his or her possession any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

False accounting

19.7 A person who dishonestly, with the intention of obtaining a gain or causing a loss:

(a) destroys, defaces, conceals or falsifies any document made or required for any accounting purpose; or

(b) in furnishing information for any purpose, produces or makes use of any document made or required for any accounting purpose that to his or her knowledge is or may be misleading, false or deceptive in a material particular

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

False statement by officer of organisation

19.8 (1) An officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly publishes or concurs in publishing a document containing a statement or account that to his or her knowledge is or may be misleading, false or deceptive in a material particular is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

(2) In this section:

"creditor" of an organisation, includes a person who has entered into a security for the benefit of the organisation;

"officer" of an organisation, includes any member of the organisation who is concerned in its management and any person purporting to act as an officer of the organisation;

"organisation" means any body corporate or unincorporated association.

PART 3.6 - BRIBERY AND OTHER CORRUPT PRACTICES

Division 20

Definitions

20.1 (1) In this Part:

"agent" includes the following:

(a) A person who acts on behalf of another person with that other person's actual or implied authority (in which case the other person is the principal).

(b) A public official (in which case the Government or Government agency of or for which the official acts is the principal).

(c) An employee (in which case the employer is the principal).

(d) A legal practitioner acting on behalf of a client (in which case the client is the principal).

(e) A partner (in which case the partnership is the principal).

(f) An officer of a corporation or other organisation, whether or not employed by it (in which case the corporation or other organisation is the principal).

(g) A consultant to any person (in which case that person is the principal).

"benefit" includes any advantage and is not limited to property;

"function" of an agent includes any power, authority or duty of the agent or any function that the agent holds himself or herself out as having;

"exercise" a function includes perform a duty;

"public official" means any official having public official functions or acting in a public official capacity, and includes the following:

(a) A member of Parliament or of a local government authority.

(b) A Minister of the Crown.

(c) A judicial officer.

(d) A police officer.

(e) A person appointed by the Government or a Government agency to a statutory or other office.

(f) A person employed by the Government or a Government agency (including a local government authority).

(2) For the purposes of this Part, a person is an agent or principal if the person is, or has been or intends to be, an agent or principal.

(3) For the purposes of this Part, the provision of a benefit may be dishonest notwithstanding that the provision of the benefit is customary in any trade, business, profession or calling.

20.2 (1) Giving a bribe. A person who dishonestly provides, or offers or promises to provide, a benefit to any agent or other person with the intention that the agent will provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) Receiving a bribe. An agent who dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another person with the intention of providing a favour is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(3) For the purposes of this section, a favour is:

(a) the agent being influenced or affected in the exercise of the agent's functions as such an agent; or

(b) the agent doing or not doing something as such an agent or because of his or her position as such an agent; or

(c) the agent causing or influencing his or her principal or other agents of the principal to do or not to do something.

Other corrupting benefits

20.3 (1) Giving other corrupting benefits. A person who dishonestly provides, or offers or promises to provide, a benefit to any agent or other person in any case where the receipt, or expectation of the receipt, of the benefit would in any way tend to influence the agent to provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(2) Receiving other corrupting benefits. An agent who dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another person in any case where the receipt, or expectation of the receipt, of the benefit by the agent would in any way tend to influence the agent to provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(3) For the purposes of this section, a favour is:

(a) the agent being influenced or affected in the exercise of the agent's functions as such an agent; or

(b) the agent doing or not doing something as such an agent or because of his or her position as such an agent; or

(c) the agent causing or influencing his or her principal or other agents of the principal to do or not to do something.

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20.4 A person who:

(a) holds himself or herself out to the public as being engaged in any business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services; and

(b) dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another in order to influence his or her selection, examination or opinion,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Abuse of public office

20.5 A public official who dishonestly:

(a) exercises any function or influence that the official has because of his or her public office; or

(b) refuses or fails to exercise any function the official has because of his or her public office; or

(c) uses any information the official has gained because of his or her public office,

with the intention of obtaining a benefit for the official or another person or causing a detriment to another person, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

List of Written Submissions Received

Peter Berman, Crown Prosecutor, NSW

Judge M Boyce, District Court, Qld

Frank Donovan & Assocs, WA

Commonwealth Department of Foreign Affairs and Trade

NSW Magistrates, per Stephen Scarlett and TG Cleary

South Australia Police

Queensland Indeterminate Sentenced Prisoners Association

Department of Administrative Services - Commonwealth

Australian Federal Police

Independent Commission against Corruption

Neil Morgan, UWA

BHP, Keith Major, Senior Corporate Solicitor

Geoffrey Miller QC, WA Bar

Victoria Police

NSW Law Society

Director of Public Prosecutions, QLD

Australian Defence Force

Ian Leader-Elliott, Senior Lecturer, Law School, University of Adelaide

Crown Prosecutors Office, NSW

Tasmanian Police

Chief Magistrate, NSW

National Council of Women of Australia Inc Ltd

Northern Territory Police

South Australia Police

Western Australia Police Department

Coles Myer Ltd

Queensland Police Service

Department of Social Security

Commonwealth Director of Public Prosecutions

Law Institute of Victoria

Victims of Crime Association, QLD

Chief Justice Murray, Supreme Court, WA

Legal Aid - Queensland

National Crime Authority

QLD Law Society

ACT Law Society

A Levy, St Kilda, Victoria

Chief Justice Gleeson, NSW

Australian Customs Service

Legal Aid Commission of NSW

Legal Aid of WA

Law Society, WA

Vic Consultation Meeting 28 August 1994
Panel Members included;

- Justice Frank Vincent
- Paul Coghlan
- Prof David Lanham
- Michael Rozenes QC
- Commander Allan Bowles
- Dr David Neal

WA Consultation Meeting 5 September 1994
Panel Members included;

- M Hall QC
- John McKechnie QC
- Neil Morgan, University of WA
- Justice Graeme Scott

ACT Consultation Meeting - 7 July 1994
Panel Members included;

- Justice Higgins
- Ken Crispin QC
- Dr David Neal

NSW Consultation Meeting - 1 September 1994
Panel Members included;

- Martin Sides QC
- Nicholas Cowdery QC
- B McKillop - Sydney University - Law School
- Dr David Neal